TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 174

UNITED STATES OF AMERICA, PETITIONER,

vs.

EMBASSY RESTAURANT, INC., ET AL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JULY 15, 1958
CERTIORARI GRANTED OCTOBER 13, 1958

Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

[fol. A] **IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

No. 12,323

In the Matter
of

EMBASSY RESTAURANT, INC.,
Debtor-Appellee,

UNITED STATES OF AMERICA,
Claimant-Appellant.

(File Endorsement Omitted)

[fol. 1]

APPENDIX TO APPELLANT'S BRIEF—filed October 11, 1957

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DOCKET ENTRIES

D. C. 117-A
BANKRUPTCY DOCKET Chapter XI

Title of Case

Cause No. 24636

In the Matter of

EMBASSY RESTAURANT, INC.,

Debtor

1418 Spruce Street, Phila. Pa.

(Assigned to Welsh, J.)

Referee and Trustee

Referee: Thomas J. Curtin
Trustee: Stanley W. Root, Morton Q. Klein & John J. Ryan

Cash Received and Disbursed

Date	*Name*	*Received*	*Disbursed*
3-1-56	Deposit	45.00	
Mar. 2, 1956	To U. S. Treas.		40.00
10-9-56	E. F.	30.10	
Oct. 10, 1956	To U. S. Treas.		30.10
12-17-56	E. F.	22.90	
Dec. 18, 1956	To U. S. Treas.		22.90
12-21-56	S. F.	134.00	
12-21-56	E. F.	149.25	
Dec. 24, 1956	To U. S. Treas.		283.25
5-14-57	E. F.	12.30	
May 15, 1957	To U. S. Treas.		12.30
5-16-57	E. F.	10.00	
May 17, 1957	To U. S. Treas.		10.00
5-23-57	S. F.	53.47	
5-23-57	E. F.	54.97	
May 23, 1957	To U. S. Treas.		108.44

Attorneys

Dennis, Cohen & Dennis, Esqs., for Debtor

Date	*Proceedings*
1956	
1 Mar. 1	Debtor's Petition for an Arrangement under Chapter XI, List of Creditors, and Affidavit for an Order extending time for filing Schedules, etc. filed.
2 Mar. 1	Petition for an Order appointing Stanley Root, Sr., Esq., and Morton Q. Klein, Receivers, with leave to operate the business for a period of 60 days, filed. Bond $5000.
3 Mar. 1	Order of Reference to Thomas J. Curtin, Esq., Referee, filed.

[fol. 2] *Proceedings*

Date		
1956		
Mar.	6	Bond of Stanley W. Root and Morton Q. Klein, Receivers, in $5000., with New Amsterdam Casualty Co., as surety, approved and filed.
4 Mar.	7	Petition for an Order appointing appraisers filed.
5 Mar.	7	Petition for an Order appointing Miller, Adelman & Lavine, Esqs., as attorneys for receivers, filed.
6 Mar.	8	Affidavit of Mailing Notices filed.
7 Mar.	8	Order confirming appointment of receivers filed.
8 Mar.	21	Schedules and Statement of Affairs filed.
9 Mar.	26	Report of Appraisers filed (to referee 3/27/56).
10 June	13	U. S. Tax Claim filed.
11 Sept.	20	Copy of petition of receivers to show cause why debtor corporation should not be adjudged a bankrupt and Order to show cause thereon returnable 10/9/56 received from referee and filed.
12 Oct.	9	Order adjudging debtor a bankrupt and directing that bankruptcy be proceeded with received from referee and filed.
13 Oct.	9	Copy of Petition and Order granting leave to receivers to sell assets at public sale and to employ an auctioneer received from referee and filed.
Oct.	17	Bond of Stanley W. Root, Morton Q. Klein & John J. Ryan, Trustees, in $15,000., with New Amsterdam Casualty Co., as surety, approved and filed.

[fol. 3] *Proceedings*

1957		
14 May	21	Certificate for Review sur denial of priority status to proofs of claim filed.

Date		
1957		
	Jun. 10	Argued sur certificate for review CAV
15	Jun. 28	Opinion, Welsh, J., vacating order of referee denying priority claims of Trustee of the Welfare Fund of Local Union 111 filed.
16	July 9	Order reversing order of referee denying the priority claims of the trustee of the Welfare Fund of Local Union 111 etc. filed. 7/10/57 noted and notice mailed.
17	" 15	Notice of Appeal by United States filed copy to R. H. Markowitz, Esq. and Nathan I Miller, Esq., 7/16/57).
18	" 15	Copy of Clerk's notice to U. S. Court of Appeals filed.
	Aug. 5	Record transmitted to U. S. Court of Appeals.
19	" 9	Stipulation of Counsel that certain agreements be included in the record of this case and Order of Court approving same, filed.
	" 12	Supplemental record transmitted to U. S. Court of Appeals.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 4] IN THE UNITED STATES DISTRICT COURT

AGREEMENT DATED MARCH 21, 1951

AGREEMENT

THIS AGREEMENT, made and entered into on this 21st day of March, 1951, by and between Embassy Club, 1418 Spruce Street, Phila., hereinafter designated as "EMPLOYER," successors and assigns, and the Local Joint Executive Board of Philadelphia, hereinafter known as the "Union", consisting of the respective Local Unions Nos. 111, 115, 138, 170, 232, 301, 434, 568, affiliated with the Hotel and Restaurant Employees' International Alliance and Bartenders' International League of America of the American Federation of Labor.

WITNESSETH:

1. In consideration of the Mutual promises hereinafter named, the parties hereto agree as follows:

ARTICLE I. Recognition.

Section 1. Employer recognizes the Union as the sole and exclusive collective bargaining representative of the employees working in the establishment now operated and maintained by the Employer or in any establishment hereafter operated and maintained by the Employer, in all matters relating to collective bargaining such as wages, hours of work, working conditions, adjustment of grievances, etc. The designated representatives of the Union shall constitute the Union representatives in all negotiations as to all matters of collective bargaining which shall be conducted. All clauses shall apply to all the employers' successors and assignees.

* * * * *

[fol. 5] ARTICLE X. Vacations.

Section 1. Each employee shall be entitled to one (1) day of vacation with pay for each two (2) months of unbroken employment. Unbroken employment is hereby defined as all time during which an employee shall retain seniority in the establishment or with the Employer under the terms of this contract. Proved illness or excused absence as provided for in the Seniority provisions shall not be construed as a break in employment. Said vacation to be taken between June 15 and September 15, the total time not to exceed two (2) weeks. Vacation periods may not be split into separate groups of days except at the specific request of the employee concerned. Any local union which has been receiving better vacation arrangements shall not receive any reduction of such benefits because of this clause. All vacation pay shall be paid at the time the employees take their vacation.

Employees with Five (5) years of service shall receive three (3) weeks vacation with pay. It is optional on the part of the employee to take the third week vacation or the extra week pay for the same.

Section 2. In the event that the Employer sells, closes his business because of business failure or discontinues the establishment prior to the time the employees take their vacations, then such Employer shall pay to each employee the vacation money which has accrued as of the time that

the Employer sells or discontinues the establishment. If the employer fails to pay the vacation pay within fifteen (15) days after the purchaser takes over the establishment, then the purchaser shall be liable for the vacation pay.

[fol. 6] Section 3. The vacation period shall be between June 15th and September 15th). This period of June 15th to September 15th is adopted so as not to interfere with operation; however, it is not to be used for purpose of computing length of service but merely to denote the period of vacation time and further, in the event that an employee leaves employment prior to the vacation period, then such employee shall receive his or her accrued vacation grant.

Section 4. Seniority shall be followed in honoring the requests of the employees as to their vacation time.

* * * *

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year aforementioned.

s/ SAMUEL SELBER (SEAL)

s/ VICTOR CIVATTE
For Local 111

s/ JOSEPH KIRK
For Local 115

s/ HARRY DAVIS
For Local 301

IN UNITED STATES DISTRICT COURT

SUPPLEMENT TO AGREEMENT DATED MARCH 21, 1951

SUPPLEMENT

The Employer agrees to contribute to the Local 301 Welfare Trust Fund, the sum of One Dollar and Twenty-five Cents ($1.25) per week per each Employee payable monthly at Five Dollars and Forty Cents ($5.40) for the [fol. 7] welfare and insurance of said Employees, members of Local 301, in the employ of the Employer.

Upon the adoption of the Welfare Plan Article X of the Agreement pertaining to sick leave shall become ineffective insofar as Waiters and Waitresses Union, Local 301 is concerned.

The above mentioned Welfare Plan shall become effective September 1, 1951, on which date the Employer shall make his first monthly contribution of Five Dollars and Forty Cents ($5.40) per each Employee, members of Local #301, to the Union's Welfare Trust Fund.

FOR THE EMPLOYER
/s/ SAMUEL SELBER

FOR THE UNION
/s/ HARRY DAVIS Local 301

IN UNITED STATES DISTRICT COURT

SUPPLEMENT TO AGREEMENT DATED MARCH 21, 1951

SUPPLEMENT TO ARTICLE X

LOCAL 111 WELFARE TRUST FUND

The Employer agrees to contribute to the Chefs, Cooks, Pastry Cooks and Assistant Union Local 111 Welfare Trust Fund the sum of $1.50 per Week per each Employee, payable $6.50 Monthly for the Welfare and Insurance for the members of Local 111 and in the employ of the Employer for the Welfare Plan.

Upon the adoption of the Welfare Trust Fund Article X of the agreement pertaining to sick leave shall become [fol. 8] ineffective insofar as the Chefs, Cooks, Pastry Cooks and Assistant Union is concerned.

The above mentioned Welfare Plan shall become effective as of September 1, 1951. The Employer shall make his first Monthly contribution of $6.50 on August 1, 1951, per each Employee, members of Local 111 to the Union's Trust Fund.

Employer /s/ SAMUEL SELBER

Union /s/ VICTOR CIVATTE

IN UNITED STATES DISTRICT COURT

SUPPLEMENT TO AGREEMENT DATED MARCH 21, 1951

SUPPLEMENT TO ARTICLE X—WELFARE PLAN

A. The employer agrees to contribute to the Chefs, Cooks, Pastry Cooks and Assistants Union, Local 111, Welfare Plan Trust Fund, the sum of $7.00 each month for each member of Local 111 in his employ. January 1, 1953

B. The employer agrees to contribute to the Bartenders' Welfare Trust Estate Fund, the sum of two dollars and fifty cents ($2.50) per week for each full time Bartender in his employ and at the rate of 5% of the per diem wage for each part time bartender in his employ. January 1, 1953

C. The employer agrees to contribute to the Local 301 Welfare Trust Fund, the sum of $5.40 per month for each employee member of Local 301 in his employ.

D. This said fund shall be maintained and utilized to promote Life Insurance, Weekly Sick Benefits, Hospital and Surgical Benefits and other benefits for the employees [fol. 9] who are members of Locals 111, 115, and 301 in the employ of the employer.

E. Upon the adoption of the Welfare Plan, Article X of the agreement pertaining to sick leave shall become ineffective in so far as the three Local Unions who are a party of this contract concerned.

For the employer s/ SAMUEL SELBER

Local 111 s/ VICTOR P. CIVATTE

Local 115 s/ JOSEPH KIRK

Local 301 s/ RAY TURCHI

IN UNITED STATES DISTRICT COURT

AGREEMENT AND DECLARATION OF TRUST, DATED DECEMBER 13, 1951

AGREEMENT AND DECLARATION OF TRUST

WHEREAS, as of December 13, 1951 there was established the CHEFS, COOKS, PASTRY COOKS, AND ASSISTANTS UNION, LOCAL 111—WELFARE PLAN, hereinafter referred to as "Local 111, Welfare Plan", which Local 111, Welfare Plan has continued in existence since that date and is still in existence, and

WHEREAS, the Local 111, Welfare Plan has been operated and administered since its inception by a Board of Trustees, the members of which Board of Trustees being designated by the Executive Board of Chefs, Cooks, Pastry Cooks, and Assistants Union, Local 111, and

WHEREAS, the members of the Board of Trustees, in their operation and administration of the Local 111, Wel- [fol. 10] fare Plan have at all times adhered to and acted in the manner required of Trustees in operating and administering trust funds for the benefit of the employees for which Employers have contrributed payments into the Local 111, Welfare Plan, and

WHEREAS, Chefs, Cooks, Pastry Cooks, and Assistants Union, Local 111, hereinafter referred to as the Union, and the Board of Trustees now desire to formalize and set forth in writing the verbal agreements and understandings between them, which verbal agreements and understandings have governed the operation and administration of the Local 111, Welfare Plan by the Board of Trustees.

NOW, THEREFORE, the Union and the members of the Board of Trustees, who presently are Victor P. Civatte, John Fer.....and Herbert Rach, and their successors, hereby execute this formal, written Agreement and Declaration of Trust which shall govern the administration and operation of the Local 111, Welfare Plan by the present members of the Board of Trustees and their successors.

ARTICLE I

Definitions

Section 1. The "Local 111, Welfare Plan" shall consist of all Policies, together with dividends, refunds or other sums payable to the Trustees on account of such Policies, all investments made and held by the Trustees, all monies received by the Trustees by way of Employer contributions or as income from investments made and held by the Trustees or otherwise, and money properly received and held by the Trustees for uses, purposes and trusts set forth in this Agreement and Declaration of Trust.

[fol. 11] *Section 2.* "Employers" means and includes each Employer and all Employers paying or contributing into the Local 111, Welfare Plan, as such payments or contributions are required by a collective bargaining Agreement or Agreements entered into or to be entered into by and between the Employer and Chefs, Cooks, Pastry Cooks, and Assistants Union, Local 111, referred to as Union.

Section 3. "Union" means Chefs, Cooks, Pastry Cooks and Assistants Union, Local 111 of the Hotel and Restaurant Employees and Bartenders International Union.

Section 4. "Board of Trustees" or "Board" or "Trustees" shall consist of those persons designated by the Executive Board of the Union to hold in trust and, as Trustees, to operate and administer the Local 111, Welfare Plan. Since the Employers, who are obligated and required to make the payments or contributions into the Local 111, Welfare Plan are not engaged in interstate commerce within the meaning and definition of the National Labor Relations Act, as amended, it does not appear to be legally required that there be joint administration of the Local 111, Welfare Plan; therefore, unless and until it be otherwise legally required, the Trustees shall continue to be solely designated by the Executive Board of the Union.

Section 5. "Employee" shall mean any employee in the employ of an Employer who, as an Employee, shall be included, now and/or in the future, in the collective bargaining unit represented by the Union. Employee shall also mean Employees employed by the Union.

Section 6. "Contributions" or "Payments" shall mean the money paid into the Union 111, Welfare Plan by the Employers and by the Union.

[fol. 12]

ARTICLE II

Name and Purpose

Section 1. There is established a trust fund to be known as the Chefs, Cooks, Pastry Cooks, and Assistants Union, Local 111—Welfare Plan.

Section 2. The purpose of the Chefs, Cooks, Pastry Cooks, and Assistants Union, Local 111—Welfare Plan shall be to provide welfare benefits for Employees who meet the eligibility requirements for coverage as such eligibility requirements presently exist or are amended.

ARTICLE III

Number of Trustees, Designation, Removal, Successor Trustees, Meetings of Trustees

Section 1. The Local 111, Welfare Plan shall be administered and operated by a Board of Trustees. The Board of Trustees shall consist of three (3) persons who shall be designated by the Executive Board of the Union. The Trustees must be members in good standing of the Union in order to be designated and to continue to serve as Trustees.

Section 2(a). If a Trustee chooses to resign, he must give thirty (30) days prior written notice in writing to the remaining Trustees of his desire to resign as a Trustee. Such notice shall set forth the date on which the Trustee wishes his resignation to become effective; however, in no event shall the effective date of the resignation be less than thirty (30) days from the date that the notice or resigna-

[fol. 13] tion is sent to the Board of Trustees unless the remaining Trustees unanimously agree to allow the effective date of the resignation to be on a date less than thirty (30) days from the date on which the resignation was sent.

Section 2(b). In case any of the Trustees shall die, become incapable of acting hereunder, resign or be removed, a successor Trustee shall be immediately appointed by the Executive Board of the Union.

Section 3. Each Trustee shall have one (1) vote. A quorum of the Board of Trustees shall consist of at least two (2) Trustees; when a quorum is present at any meeting, the Trustees present and voting shall decide any questions and matters brought before such meeting and the action of a quorum of the Board of Trustees shall be valid and binding as the action of the Board of Trustees.

Section 4. Any successor Trustee shall, immediately, upon appointment as a successor Trustee, and upon acceptance of the Trusteeship in writing, became vested with all the property, rights, power and duties of a Trustee hereunder, and notice of the appointment of the successor Trustee or Trustees shall be given to all of the other Trustees, to any bank or banks used as a depository for the Local 111, Welfare Plan, as well as any other institution or person holding any of the property and assets of the Local 111, Welfare Plan.

Section 5. The Trustees shall have a regular meeting of the Board of Trustees at least once each every three (3) month period of the year. The chairman of the Board of Trustees, who shall be designated by the members of the Board of Trustees, may call a meeting of the Trustees at [fol. 14] any time by giving at least seven (7) days' notice of the date, time and place thereof to the remaining Trustees. Any two (2) of the Trustees may call a meeting of the Board of Trustees by giving at least ten (10) days' notice of the date, time and place to the remaining Trustees. Meetings of the Board of Trustees may also be held at any time without any notice if all of the Trustees consent thereto. If the circumstances require it, then action may be taken by the Trustees without a meeting; provided, however, that in such case there shall be a unanimous written consensus by all of the Trustees then in office.

Section 6. Any Trustee may, by power of attorney or other written authorization, empower the other Trustees to act on his behalf and to use his name for the execution or signature of any document for the purpose of these presents and of the trust hereby executed without being responsible or liable for any loss in connection therewith as to his responsibility as hereinafter set forth.

ARTICLE IV

Powers and Duties of Trustees

Section 1. In operating and administering the Local 111, Welfare Plan, the Trustees shall have the power and/or duty:

(a). To establish the policy and rules pursuant to which the Local 111, Welfare Plan is to be administered and operated.

(b). In connection with the administration and operation of the Local 111, Welfare Plan and in order to effec- [fol. 15] tuate the purpose for the establishment of the Local 111, Welfare Plan, as such purpose is described in Article II, Section 2 above; to formulate and establish the conditions of eligibility for coverage.

(c). To formulate provisions for the payments of benefits and to formulate all other provisions including all details pertaining to insurance policies, which may be required as necessary to carry out the purposes for the establishment of the Local 111, Welfare Plan, as such purposes are described in Article II, Section 2 above.

(d). To receive and collect all contributions or payments due to and payable to the Local 111, Welfare Plan. In so doing, the Trustees, in their sole discretion, shall have the right to maintain any and all actions for legal proceedings necessary for the collection of the Employer's contributions or payments as such contributions or payments are provided for or required; at present, subject to amendment by later collective bargaining agreement, each Employer is required to pay or contribute into the Local 111, Welfare Plan the sum of eight ($8.00) Dollars per month for every employee within the collective bargaining unit represented by the Union. The Trustees, shall have the right to prosecute, defend, compound, compromise, settle, abandon or adjust, by arbitration or otherwise, any actions, suits, proceedings, disputes, claims, details and things relating to the Local 111, Welfare Plan.

(e). To verify the accuracy of statements and information submitted by the Employers and Employees on contribution forms, claim forms, and other forms. In furtherance of this right and duty, the Trustees may require the

[fol. 16] Employers to furnish to the Trustees such information and reports as they, the Trustees, may require in the performance of their work as Trustees and the Employers shall furnish such information and reports when required to do so by the Trustees.

(f). To invest and reinvest the principal and income of the Local 111, Welfare Plan and to keep the same invested without distinction between principal and income provided, however, that investments and reinvestments may be made only in accordance with the applicable law, if any, relating therein. If deemed advisable by the Trustees, they may retain an investment agent or advisor, whether it be a bank or trust company or a corporation or an individual, to counsel and advise the Trustees in all matters relating to investments and reinvestments. The Trustees shall have the right to reserve and keep unproductive of income such monies of the Local 111, Welfare Plan as the Trustees may determine to be advisable without liability for interest on such amounts.

(g). To sell, exchange, convey, transfer or dispose of, and also credit options with respect to any property, whether real or personal, at any time held by the Local 111, Welfare Plan. Any sale may be made by contract or by auction and no persons dealing with the Trustees shall be required to see to the application of the money or to inquire into the validity, expediency, or propriety of such sale or other disposal. Also, to retain, manage, operate, repair, improve and mortgage for any period any real estate held by the Trustees. Also, to make, effectuate and deliver any and all deeds, assignments, documents of [fol. 17] transfer, and any other instruments that may be necessary or appropriate to carry out the powers herein granted.

(h). To erase any investment of the Local 111, Welfare Plan whether it be in the form of securities or other property, to be registered in, or to be sent in the name of the Trustees or the name of any of the Trustees, or to retain such investment unregistered or in such form permitting transfer by delivery, but the books and records of the Trustees shall at all times show that all such investments are part of and belong to the Local 111, Welfare Plan; to vote in person or by proxy, or otherwise, on any secur-

ities held by the Trustees and to exercise by attorney or in any other manner, any of the rights of whatsoever nature pertaining to securities or any other property held by the Trustees at any time; to consent to the recapitalization, consolidation, sale, merger, dissolution or readjustment of any corporation, company or association which has issued the securities held by and belonging to the Local 111, Welfare Plan; to exercise any option or options, make any agreement or subscription, pay any expenses, in connection with the securities and to hold and retain any property acquired by means of the exercising of the powers hereinbefore expressed to the extent that the Trustees, in their discretion, deem it acceptable.

(i). To pay and provide for the payment of all reasonable and necessary expenses of collecting the Employer contributions or payments; to pay and provide for the payment of all expenses which may be incurred in connection with the establishment and operation of the Local 111, Welfare Plan, such as expenses for the employment of ad- [fol. 18] ministrative, legal, expert and clerical assistance, the purchase or lease of premises to be used and occupied by the Local 111, Welfare Plan, the purchase or lease of such materials, supplies, and equipment, as the Trustees, in their discretion, find necessary to appropriate in the exercising of their rights and duties as Trustees.

(j). To deposit all funds received by the Local 111, Welfare Plan in such bank or banks as the Trustees may designate for that purpose, provided, however, that the depositary bank or banks shall be members of and insured by the Federal Deposit Insurance Corporation. The withdrawing of funds from the designated depositary bank or banks shall be made only by check signed by Trustees, or several of them, or person or persons as authorized by the Board of Trustees to sign and countersign checks.

(k). To keep true and accurate books of account and records of all of the transactions of the Local 111, Welfare Plan and to have an audit made of all books and accounts by a certified public accountant at least annually, which report, in writing, of the certified public accountant shall be made available to the Employer and to the Union and also placed in the office where the business of the Local 111, Welfare Plan is transacted.

(l). To determine from time to time whether and to what extent and at what times and places and under what conditions and regulations, the books of the Trustees shall be open for inspection and no Employer or member of the Union shall have any right to inspect any book or document of the Trustees except as authorized by resolution of the Trustees or except in accordance with such conditions and [fol. 19] regulations, if any, as may be so prescribed from time to time by the Trustees. Also, to issue such financial statements or other reports as they, the Trustees, may deem proper and to determine at what time such statements shall be issued and the method of distribution.

(m). To borrow money with or without security, on such terms as the Trustees, in their discretion may deem desirable, and for such sums borrowed to issue notes, bonds or other obligations therefor, and/or to pledge the property of the Local 111, Welfare Plan or any part thereof.

(n) To delegate any of the powers and duties of the Trustees to any agent or employee engaged by them or to any one or more of the Trustees themselves.

(o). To make, adopt, amend or repeal by-laws, rules and regulations not inconsistent with the terms of this Agreement and Declaration of Trust, as the Trustees may deem necessary or desirable for the conduct of their business and the government of themselves, their officers, agents, and other representatives; to amend the Local 111, Welfare Plan provided that the amendments comply with the purpose hereof and further provided that any amendments to the Local 111, Welfare Plan shall be signed by the Trustees as part of the records and meeting of the Trustees and a copy of all shall be sent to the Employer and the Union.

(p). To require, in the discretion of the Trustees, an Employer to post a surety bond to insure the payment of the required contributions or payment into the Local 111, Welfare Plan if the Employer is in default in making the required contributions or payments into the Local 111, [fol. 20] Welfare Plan. The form and amount of the surety bond shall be prescribed by the Trustees. In lieu of such surety bond, an Employer, hereinbefore described, may post cash or a certified check with the Trustees in

the same amount as above set forth in lieu of which cash or a certified check is being posted. The surety bond or, in lieu thereof, the cash or certified check posted, shall be held by the Trustees so that they will be able to collect therefrom the amount due to the Local 111, Welfare Plan, and, if that event occurs, the Employer shall be required to reestablish the surety bond or cash or certified check in the same amount that was set before such collection out of such surety bond, cash or certified check was made, or in a revised amount. The Trustees shall decide for how long the surety bond, cash or certified check shall remain posted by the Employer. This right to require an employer to post a surety bond or cash or certified check in lieu thereof, shall be a right available to the Trustees, in addition to the right available to the Union, to request the Employees to refuse to work for that Employer.

(q). To appoint, if the Trustees deem it advisable, a bank trust insurance company, or other financial institution as Corporate Trustee and to enter into and execute a Trust Agreement with said Corporate Trustee, which Trust Agreement shall contain provisions therein for the proper management of the Local 111, Welfare Plan; upon the execution of such Trust Agreement, the Trustees may convey and transfer to the Corporate Trustee such part of the Local 111, Welfare Plan as may, in the sole discretion of the Trustees, be proper and advisable. There shall be no limit with respect to the powers which the Trustees may [fol. 21] grant to the Corporate Trustee in such Agreement, provided, however, that the funds of the Local 111, Welfare Plan may be invested and reinvested only in accordance with the applicable law, if any relating thereto. Instead of designating a Corporate Trustee for the purpose hereinbefore described, the Trustees may, in their discretion, retain an investment advisor or agent, as hereinbefore described in Article IV, Section 1(f), as to all matters relating to investments and reinvestments.

(r). To construe the forms and provisions of this Agreement and Declaration of Trust, the Local 111, Welfare Plan, and all other supplementary and amendatory documents, and the construction adopted by the Trustees in good faith shall be binding upon the Employer, the

Union, the Employees, any beneficiaries, and all other persons who may be involved or affected.

(s). To perform and do any and all such actions and things that may be properly incidental to the exercising of the powers, rights, duties and responsibilities of the Trustees.

ARTICLE V

LIABILITY OF TRUSTEES, INDEMNIFICATION OF TRUSTEES, TRUSTEES REIMBURSEMENT FOR EXPENSES, NOTICE TO OTHER PERSONS REGARDING THEIR DEALINGS WITH TRUSTEES.

Section 1. A Trustee or the Trustees shall be protected in asking in good faith upon any paper or document believed by the Trustee or Trustees to be genuine and believed to have been made, executed and deliverd by the [fol. 22] parties purporting to have made, executed or delivered the same, and the Trustee or Trustees shall be protected in relying and acting to the administration or operation of the Local 111, Welfare Plan. So long as the Trustee or Trustees commit no act of wilful misconduct, bad faith, or gross negligence, the Trustee or Trustees shall not be held personally answerable or personally liable for either (1) any liability or debts contracted by them as Trustees, or for the non-fulfillment of contracts or, (2) for any error of judgment or for any loss arising out of any act or omission in the execution of the Trust, or (3) for the actions or omissions, whether or not performed at the request of the Trustee, of any other Trustee or of any Employee, agent, or attorney elected or appointed by or working for the Trustees.

Section 2. The Trustees shall not be liable for the proper application of any part of the Local 111, Welfare Plan or for any other liability arising in connection with the administration or operation of the Local 111 Welfare Plan except as herein provided for.

Section 3. The Trustees may from time to time consult with legal counsel for the Local 111, Welfare Plan and shall be fully protected in acting and relying upon the advice of such legal counsel.

Section 4. The Trustees may seek protection by any act or proceeding that they may deem necessary in order to settle their accounts; the Trustees may obtain a judicial termination or declaratory judgment as to any question of construction of the Agreement and Declaration of Trust or as to any act thereunder.

[fol. 23] *Section 5.* A Trustee or Trustees may require the other Trustees as well as the Executive Board and Union to execute a release after an audit of the Local 111, Welfare Plan by a certified public accountant discloses that all affairs are in proper order thus entitling the Trustees to a release in favor of each Trustee, his heirs, executors, administrators and assigns.

Section 6. The cost and expense of any action, suit or proceeding brought by or against the Trustees or any of them, which costs and expenses shall include counsel fees, shall be paid from the Local 111, Welfare Plan except in relation to matters as to which it shall be adjudged in such action, suit or proceeding that such Trustee was acting in bad faith or was grossly negligent or was guilty of wilful misconduct in the performance of such Trustees' duties.

Section 7. Trustees shall not be bound by any notice, declaration, regulations, advice or requests unless and until it shall have been received by the Trustees at the principal place of the business of the Local 111, Welfare Plan located in Philadelphia, Pennsylvania.

Section 8. No person, partnership, corporation, or association dealing with the Trustees shall be obligated to see as to the application of any funds or property of the Local 111, Welfare Plan or to see that the terms of the Local 111, Welfare Plan have been complied with or be obligated to inquire into the necessity or expediency of any act of the Trustees and every instrument effected by the Trustees shall be conclusive in favor of any person, partnership, corporation or association relying thereon that: (a) [fol. 24] at the time this delivery of said instrument the trust was in full force and effect and that the (b) said instrument was effected in accordance with the terms and conditions of this Agreement and Declaration of Trust; and (c) the Trustee was duly authorized to execute such instrument.

Section 9. The Trustees shall receive no compensation for their services, but shall be reimbursed for all reasonable and necessary expenses that they incur in the performance of their duties. However, a Trustee or Trustees may be compensated if specially designated by the Board of Trustees to perform work of an administrative nature for the Local 111, Welfare Plan.

Section 10. The Trustees and all Employees of the Local 111, Welfare Plan shall be bonded by a duly authorized surety company in an amount of Ten Thousand ($10,000.00) Dollars for each Trustee and employee of the Local 111, Welfare Plan. The cost of the premium of each bond shall be paid out of the Local 111, Welfare Plan.

ARTICLE VI

Contributions or Payments to the Pension Fund; Default by Employer or Other Employers.

Section 1. The contributions or payments of the Employers shall be made in the amount set forth in the collective bargaining Agreement or Agreements and amendment or amendments thereto presently in existence or to be hereafter in existence by and between the Union and the Employers. At present the contributions or payments by the Employers into the Local 111, Welfare Plan is Eight ($8.00) Dollars per month for each employee within [fol. 25] the collective bargaining unit represented by the Union. The Employers' contribution or payments are due into the Local 111, Welfare Plan by the first day of the month following the end of the month in which the employees have worked; for example, payments or contributions are due on the first of February for the month of January and on the first days of each succeeding month thereafter for the work performed during the preceding month. All contributions or payments shall be forwarded to the offices of the Union which are presently located at 1207 Walnut Street, Philadelphia, Pennsylvania. The The Union's contributions or payments into the Local 111, Welfare Plan for its employees shall be in the amount of Eight ($8.00) Dollars per month for each covered Union employee and such payments shall be made on the first day of the month for the preceding month's work.

Section 2. The Trustees may compel and enforce the payment of the contributions in any manner which they may deem proper; however, the Trustees shall not be required to compel and enforce the payments of the contributions or payments or else to be personally or collectively responsible therefor if, in the opinion of the Trustees, the enforcement of the payment or contributions would involve an expense greater to the Local 111, Welfare Plan than the amount to be gotten from any effort to compel or enforce the payment of the contributions or payments.

Section 3. The Trustees shall have the right, in their discretion, to endeavor to secure payment for all expenses incurred by the Trustees if the Trustees are forced to incur an expense in bringing suit or in undertaking arbitration proceedings against a defaulting Employer.

[fol. 26] *Section 4.* The Trustees shall have the right, in their discretion to request an Employer to furnish to the Trustees all wage records relating to such Employer's employees along with the payments due and the Trustees shall have the right to seek the aid of the Union in securing such wage records from an Employer.

Section 5. The Trustees shall also have the right, in their discretion, to request that the Union proceed against the defaulting Employer in any legal and proper manner available to the Union in order to require or compel an Employer to adhere to the collective bargaining Agreement or amendment thereto by which the Employer has undertaken the obligation to make the required contributions or payments.

ARTICLE VII

Employees' Rights.

Section 1. No Employee nor any person claiming by or through any Employee by reason of having been named a beneficiary in any certificate or insurance or otherwise nor any Employer nor the Union nor any other person, partnership, corporation, or association shall have any right, title or interest in or to the Local 111, Welfare Plan or any part thereof. Title to all of the money, property and income paid into or acquired by or accrued to the Local 111, Welfare Plan shall be vested in and remain exclusive-

ly in the Board of Trustees of the Local 111, Welfare Plan and it is the intention of the parties hereto that said Local 111, Welfare Plan shall constitute an irrevocable trust and that no benefits or monies payable from the Local 111, [fol. 27] Welfare Plan shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void. The monies to be paid into the said Local 111, Welfare Plan shall not constitute or be deemed monies due to the individual Employees nor shall said monies in any manner be liable for or subject to the debts, contracts, liabilities, or torts of the parties entitled to such money upon the termination of the Local 111, Welfare Plan.

Section 2. In view of the manner in which the liability to make contributions or payments has been imposed upon the Employers arising out of collective bargaining, the Trustees shall have the right, in their discretion, to file claims in any proceedings in which an insolvent Employer is involved; the Trustees shall endeavor to have such claims considered and declared to be priority claims entitled to payment preference.

ARTICLE VIII

Amendments; Liquidation of Welfare Trust Fund and Catering Welfare Fund.

Section 1. The provisions of this Agreement and Declaration of Trust may be amended by an instrument in writing executed by and between the Trustees and the Union; provided, however, that no investment shall divert the assets of the Local 111, Welfare Plan from the purposes of these trusts as such purposes are described in Article II, Section 2 above.

[fol. 28] *Section 2.* This Agreement and Declaration of Trust and the Trusts herein referred to shall not be eliminated except upon sixty (60) days prior written notice being given by either the Union to the Trustees or by the Trustees to the Union; if parties of termination be given, then the Local 111, Welfare Plan shall be applied and

disbursed by the Trustees so as to (a) pay any and all outstanding debts and obligations of the Local 111, Welfare Plan and, then (b) to apply any remaining surplus in a manner best thus to effectuate the purpose set forth in Article II, Section 2 above, and then, upon the disbursement of all of the funds in the Local 111, Welfare Plan, this Agreement and Declaration of Trust shall terminate. However, if, prior to the disbursement of the funds in the Local 111, Welfare Plan a new Agreement and Declaration of Trust is entered into by and between the Union and the Trustees, then the Local 111, Welfare Plan shall become reactivated and there shall be no further action taken toward termination, but thereafter all disbursements from the Local 111, Welfare Plan shall be made only as provided for in this Agreement and Declaration of Trust and as it may be amended.

ARTICLE IX

Section 1. This Agreement and Declaration of Trust may be executed in one or more counterparts. The signature of a party on any counterpart shall be sufficient evidence of his execution hereof.

Section 2. The provisions of this Agreement and Declaration of Trust shall be liberally construed in order to promote and effectuate the establishment and operation [fol. 29] of the Local 111, Welfare Plan herein mentioned. The Trustees shall have power to interpret, apply and construe the provisions of this Agreement and Declaration of Trust and Local 111, Welfare Plan and any construction, interpretation and application adopted by the Trustees in good faith shall be binding upon the Union, the Employer, as well as upon the Employees, beneficiaries, and all other persons who may be involved or affected.

Section 3. In the event that any provisions of this Agreement and Declaration of Trust shall be held illegal or invalid for any reason, said illegality or invalidity shall not affect the remaining provisions of this Agreement and Declaration of Trust; the provision or provisions held illegal or invalid shall be fully severable and the Agreement and Declaration of Trust shall be constructed and enforced as if said illegal or invalid provisions had never been inserted herein.

Section 4. This Local 111, Welfare Plan is accepted by the Trustees in the Commonwealth of Pennsylvania, and all questions pertaining to its validity, construction and administration shall be determined in accordance with the laws of the Commonwealth of Pennsylvania.

Section 5. Wherever any words are used in this Agreement and Declaration of Trust in the masculine gender, they shall be construed as though they were also used in the feminine gender in all situations where they would so apply, and wherever any words are used in this Agreement and Declaration of Trust in the singular form, they shall be construed as though they were also used in the plural form in all situations where they would so apply, and wherever any words are used in this Agreement and [fol. 30] Declaration of Trust in the plural form, they shall be construed as though they were also used in the singular form in all situations where they would so apply.

IN WITNESS WHEREOF, the undersigned, by their duly authorized proper officers, do hereunto set their hands and seals as of the date first above mentioned.

Board of Trustees

Chefs, Cooks Pastry Cooks, and Assistants Union, Local 111

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The undersigned Trustees, by their execution of this Agreement and Declaration of Trust, do hereby accept the trusteeship and declare that they will receive and hold the Local 111, Welfare Plan as Trustees by virtue of this Agreement and Declaration of Trust for the uses, purposes and trust herein set forth and with the powers and duties herein set forth and none others.

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[fol. 31] IN THE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

LIEN CLAIM OF UNITED STATES—dated June 12, 1956

In Arrangement Chapter XI
Claim of the United States for Taxes
Lien Claim

State of Pennsylvania, } ss.:
County of Philadelphia. }

IRA HIRSCHBERG, Chief, Special Procedures Section, Collection Division, Office of the District Director of Internal Revenue, Philadelphia, a duly authorized Agent for the United States in this behalf, being duly sworn, deposes and says:

1. That EMBASSY RESTAURANT INC., above named is justly and truly indebted to the United States in the sum of $25,102.64, with interest thereon as hereinafter stated.

2. That the nature of the said debt is Internal Revenue Taxes due pursuant to Law as follows:

[fol. 32]

Nature of Tax and Statute Involved	*Year or Taxable Period Ended*	*Amount of Tax*	*With interest at the Rate of 6% per annum Interest Began*	*Lien Date*
INTERNAL REVENUE CODE OF 1939	*Sections 1622 and 1400-10*			
Chapt. 9	2nd Qtr. 1954	* 1,092.21	3/2/56	8/13/54
	Accrd. int. to 3/1/56	317.89		
Sub-Chapts. D&A	" penalty	186.65		
Withholding and Fed. Ins. Contrib.	4th Qtr. 1954	3,910.10	—	2/23/55
OF 1954	*Sections 3402 and 3101-3111*			
Chapts. 24&21	1st Qtr. 1955	* 3,955.20	3/2/56	5/31/55
	Accrd. int. to 3/1/56	160.96		
Withholding and	2nd Qtr. 1955	* 2,996.35	"	8/15/55
Fed. Ins. Contrib.	Accrd. int. to 3/1/56	95.41		
	3rd Qtr. 1955	* 1,741.31	"	11/23/55
	Accrd. int. to 3/1/56	25.99		
	4th Qtr. 1955	2,402.62	—	2/23/56
	1st " 1956	1,640.38	—	"
OF 1939	*Section 1700 E*			
Chapt. 10	4th Qtr. 1953	* 3,370.82	3/2/56	4/9/54
	Accrd. int. to 3/1/56	373.79		
Sub-Chapt. A	" penalty	168.54		
Cabaret Tax				
OF 1954	*Section 4231-32*			
	2nd Qtr. 1955	631.70	—	8/23/55
Chapt. 33	4th " "	1,743.60	—	2/15/56
Sub-Chapt. A	Accrd. int. to 3/1/56	284.12		
Cabaret Tax				
		$25,097.64		
	Lien Fees	5.00		
		$25,102.64		

NOTE: *-Denotes Liens filed of Record Lien #26922 filed 3/7/55 and Lien #28150 filed 1/5/56 in the office of the Prothonotary Phila. County Court, City Hall, Philadelphia, Pennsylvania, as well as other Liens indicated in last column and claimed as a Lien priority. *Interest continues to accrue on Liened Items to date of payment.*

3. That no part of said debt has been paid, but that the same is now due and payable at the Office of the District Director of Internal Revenue at Philadelphia.

4. That there are no set-offs or counterclaims to said debt:

[fol. 33] 5. That the United States does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received any security or securities for said debt, except statutory liens.

6. That the said indebtedness is now due and payable; that no note or other negotiable instrument has been received for said debt or any part thereof and that no judgment has been rendered thereon.

7. That said debt has priority, and must be paid in full in advance of distribution to creditors, as and to the extent provided in Section 64 or Section 659 of the Bankruptcy Act, Section 3466 of the United States Revised Statutes, or other applicable provisions of Law. Attention is also called to the provisions of Section 3467 of the United States Revised Statutes, with respect to the personal liability of every Executor, Administrator, Assignee or other person who fails to pay the claims of the United States in accordance with their priority.

Dated this 12 day of June, 1956.

IRA HIRSCHBERG, /s/
Chief, Special Procedure Section,
Office of the District Director of
Internal Revenue—Philadelphia.

* * * *

Duly sworn to by Ira Hirschberg
jurat omitted in printing
(all in italics)

[fol. 34] IN UNITED STATES DISTRICT COURT

AGREEMENT DATED JULY 1, 1956

AGREEMENT

THIS AGREEMENT, made and entered into on this 1st day of July, 1956, by and between the GREATER PHILADELPHIA RESTAURANT OPERATORS, INC. (hereinafter designated as "CORPORATION"), acting for itself and on behalf of the corporation, partnerships

and individuals listed herein (hereinafter designated as "EMPLOYERS"), and the LOCAL JOINT EXECUTIVE BOARD OF PHILADELPHIA (hereinafter designated as "UNION"), consisting of the respective Local Unions No. 111, 115, 232 and 301, and affiliated with the Hotel and Restaurant Employees' and Bartenders' International Union, American Federation of Labor.

WITNESSETH:

1. In consideration of mutual promises hereinafter named, the parties hereto agree as follows:

ARTICLE I. Recognition

Section 1. CORPORATION recognizes the UNION as the sole and exclusive collective bargaining representative of the employes, in the classifications set forth in the individual Schedule "A" hereto attached, working in each establishment now operated and maintained by any of the EMPLOYERS or in any establishment hereafter operated and maintained by any of the EMPLOYERS, in all matters relating to collective bargaining such as wages, hours of work, working conditions and adjustment of grievances. The designated representatives of the UNION and its affiliates Local Unions No. 111, 115, 232 and 301 shall constitute the UNION representatives and the CORPORA- [fol. 35] TION shall constitute the EMPLOYERS representative in all negotiations as to all matters of collective bargaining which shall be conducted. All clauses shall apply to each of the EMPLOYERS' successors and assignees. This agreement shall be applicable to any other Employer who may become a member of the CORPORATION after the date of this agreement and a copy of whose approved application for membership in CORPORATION SHALL be filed with UNION by CORPORATION; provided, however, that such member shall have first agreed with UNION on the wage scale for the employes of such members, and provided that the then existing contract of such Employer shall have expired.

• • • •

ARTICLE X. Sick Leave

(It is expressly agreed that this ARTICLE X shall be operative only in the event the Welfare Plans as hereinafter provided shall not be in effect.)

Absence due to illness shall be paid for at the normal rate of pay provided, however, that pay for such absence due to illness shall not exceed 7 days per year.

If an employe shall not receive any sick leave or shall not receive the full sick leave to which such employe is entitled during the year, such sick leave shall accumulate; provided, however, that sick leave shall not accumulate for a period in excess of twenty-one days of payable sick leave.

Any employe employed for less than 90 days shall not be entitled to sick leave; provided, however, at the completion of 90 days of employment an employe shall be entitled to sick leave as herein above set forth and shall be paid for such sick leave in the following manner.

[fol. 36] At the time such employe returns to work, the employe shall receive one day's sick leave pay for each two months of service from the date of original employment and the balance due to such employe shall thereafter be paid to him at the rate of one day's sick leave pay for each subsequent two months of employment.

• • • •

ARTICLE XXI. Welfare Plans

A. Each Employer agrees to contribute:

(a) to the Chefs, Cooks, Pastry Cooks and Assistants Union, Local 111, Welfare Plan Trust Fund, the sum of Eight Dollars ($8.00) each month for each full-time employe member of Local 111 in his employ.

(b) to the Bartenders' Welfare Trust Estate Fund, the sum of Two Dollars and fifty cents ($2.50) per week for each full time bartender in his employ at the rate of five per cent (5%) of the per diem wage for each part-time bartender in his employ.

(c) to the Local 301 Welfare Trust Fund, the sum of Eight Dollars ($8.00) per month, for each steady employe member of Local 301 in his employ. However, in no event will more than Eight Dollars ($8.00) per month be paid for any particular employe during any one month.

(d) to the Counter Workers Local 232 Health and Welfare Trust Fund, the sum of Five Dollars ($5.00) per week for each full-time employe member of Local 232 in his employ, and the sum of Two Dollars and fifty cents ($2.50) per week for each part-time employe member of Local 232 in his employ.

[fol. 37] B. These funds shall be maintained and utilized to promote Life Insurance, Weekly Sick Benefits, Hospital and Surgical Benefits and other benefits for the employes who are members of Locals 111, 115, 232 and 301 in the employ of the Employer, as in past practice.

C. Should the Employer fail to make the agreed upon contribution to the Insurance Fund, he shall be personally liable for all payments and expenses incurred by employes due to accidents and illnesses, which payments and expenses would have been covered by and paid for by the insurance agreement set forth above.

D. Welfare payments are due and payable the first business day of the month for the then current month.

• • • •

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year aforementioned.

GREATER PHILADELPHIA RESTAURANT OPERATORS. INC.
THOMAS ROBERTS s/ (SEAL)
President

MRS. MATILDA LOCKMAN s/ (SEAL)
Secretary

FOR THE LOCAL JOINT EXECUTIVE BOARD

WILLIAM J. BRENNAN s/
President

I. HERMAN STERN s/
Sec'y.-Treas.

[fol. 38] Attest:

JOHN M. TAXIN s/

Witness:

BERT ROSS s/

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

REFEREE'S CERTIFICATE FOR REVIEW SUR DENIAL OF PRIORITY STATUS TO PROOFS OF CLAIMS—May 21, 1957

To the Honorable, the Judges of Said Court:

I, Thomas J. Curtin, Referee in Bankruptcy, to whom the above matter was referred, respectfully certify:

Statement of the Case

The claimants, Harry Davis and Victor Civatte, filed proofs of claim in the amounts of $216.00 and $336.00 respectively, claiming priority as wage claimants for monies due to their respective Welfare Trust Fund or Plan, in accordance with collective bargaining agreements between Locals 111 and 301 with the bankrupt, Embassy Restaurant, Inc.

[fol. 39] At a hearing held before the Referee on May 7th, 1957, the Referee denied these two claims the status of a priority wage claimant, but allowed the two claims as general unsecured claims.

Discussion

The form of the collective bargaining agreement was not annexed to the proof of claim in this case, so that the Referee is compelled to look to the proofs of claim.

Both proofs are practically identical, showing they were based upon

(A) contributions to the said Welfare Trust Fund due and owing in accordance with the provisions of the collective bargaining agreement accruing within a period of three months prior to bankruptcy. The employer agrees to contribute to the Local Welfare Trust Fund the sum of $8.00 per month for each employee member of Local 301 in his employ.

(B) contributions due in accordance with the attached provisions of the collective bargaining agreement (A) the employer agrees to contribute to the Cooks, etc. Local 111 Welfare Plan Trust Fund the sum of $8.00 per month per each member of Local 111 in his employ.

The identical question posed here was before the 2nd Circuit in a recent case, Local 140 Security Fund v. Hack, No. 24113, decided March 4, 1957, opinion by J. Leibell.

At one point this case states—Other collective bargaining agreements, such as the case at bar, provide only for a payment by the employer to the Welfare Fund, with no assignment, or deduction from the workman's wage—

[fol. 40] The Court refused the claim of priority, holding that the bargaining agreement created only a debtor

and creditor obligation between the employer and third parties, for something other than wages.

The Referee is in accord with this opinion and denies the claimant's priority as a wage claimant.

CONCLUSIONS OF LAW.

1. The claimants are denied the status of priority wage claimants under Section 64-(a) 2 of the Bankruptcy Act.

2. The claimants are allowed the status of general unsecured creditors in the amounts of $216.00 and $336.00 respectively.

In accordance with the said petition for review, I transmit herewith the following record to your Honorable Court:

1. Proof of claim (19) of Harry Davis.
2. Proof of claim (20) of Victor P. Civatte.
3. Petition for Review.
4. Testimony (May 7th, 1957).

Respectfully submitted,

THOMAS J. CURTIN,
Referee.

May 21st, 1957.

[fol. 41] IN UNITED STATES DISTRICT COURT

OPINION—June 28, 1957

WELSH, J.

This case is before the Court on a petition for review of the disallowance by the Referee in Bankruptcy of certain priority wage claims filed on behalf of the employees of the Bankrupt by the Trustee of the Employees' Welfare of Local Union 111 and by the Trustee of the Employees' Welfare Fund of Local Union 301.

On May 21, 1951, Embassy Restaurant, Inc., entered into a collective bargaining agreement with Local Unions 111 and 301, recognizing said Unions as the sole and exclusive bargaining representatives of the employees in all negotiations as to all matters of collective bargaining thereafter to be conducted. Said agreement contained provisions relating to hours, wages, vacations, holidays, seniority and other conditions of employment. Another provision of said agreement related to sick leave with pay for seven days each year which could be accumulated if not used to a maximum of twenty-one days.

In a supplemental agreement, dated January 1, 1953, the Employer and Local Unions agreed to make the provision in the agreement pertaining to sick leave ineffective. In its stead the Employer agreed to contribute certain sums for each employee to a Welfare Plan, the funds to be maintained and utilized to promote life insurance, weekly sick benefits, hospital and surgical benefits and other benefits for the employees.

Subsequently, on July 1, 1956, a collective bargaining agreement was entered into between Greater Philadelphia Restaurant Operators, Inc., acting on behalf of Embassy [fol. 42] Restaurant, Inc., and other restaurants, and Local Unions 111 and 301 which provided for contributions to the Welfare Trust Funds of Local Unions 111 and 301.

The foregoing provisions were in effect at the time of the instant bankruptcy.

The Welfare Plans are administered pursuant to a formal written agreement and declaration of trust. Each trust provides that employee shall mean any employee in

the collective bargaining unit represented by the Union; and provides further that the purpose of the Welfare Plan shall be to provide welfare benefits for employees. The collective bargaining agreement provides that each employer is required to pay the sum of $8.00 per month for every employee within the collective bargaining unit represented by the Union. In view of the manner in which the liability to make contributions or payments has been imposed upon the employers arising out of collective bargaining the Trustee of the Welfare Fund has the right in his discretion to file claims in any proceedings in which an insolvent employer is involved; and said Trustee shall endeavor to have such claims considered and declared to be priority claims entitled to payment preference. Finally, it is provided that all questions pertaining to the Trust's validity, construction and administration shall be determined in accordance with the laws of the Commonwealth of Pennsylvania.'

Subsequent to the Employer's being adjudged a Bankrupt the Trustee of the Welfare Fund of Local Union 111 filed his proof of claim, as did the Trustee of the Welfare Fund for Local Union 301, seeking the status of a priority wage claimant, pursuant to the provisions of Section 64(a)(2) of the Bankruptcy Act, 11 U.S.C. Section 104 [fol. 43] (a)(2), for payments to the Welfare Funds in the amounts of $216.00 and $336.00 which had accrued in the three month period prior to the Bankruptcy. The Referee denied the priority claims asserted but allowed the Trustees of the Welfare Funds the status of general unsecured creditors in the amounts of $216.00 and $336.00 respectively. The instant petition for review thereupon followed.

1. Section 64(a) of the Act provides that: "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, * * * shall be * * * (2) wages not to exceed $600.00 to each claimant, which have been earned within three months before the date of the commencement of the proceedings, due to workmen * * *."

It is observed that contributions due the Welfare Funds from the Bankrupt Employer in this proceeding do "not

* * * exceed $600.00 to each claimant", by reason of the amount the Employer was obliged to pay monthly for each employee; and "have been earned within three months before the date of the commencement of the proceeding". Also, it is undisputed that the employees, whose numbers within the collective bargaining units represented by the respective Unions determined the amount of the unpaid contributions for which wage priorities are claimed, were "workmen" within the meaning of 64(a)(2).

2. Thus, the sole remaining question is: "Are the unpaid contributions from the Bankrupt Employer to the Welfare Funds under the collective bargaining agreement 'Wages' which are due to workmen and therefore entitled to priority within the meaning of Section 64(a)(2)?"

3. The precise question has not been decided by this Circuit. Cases outside this Circuit concerned with the [fol. 44] problem are in conflict. While it is true those cases are not binding on us we have examined them none the less and consider the case of *In Re Otto*, 146 Fed. Supp. 787, most persuasive. In that case the opinion of Judge Mathes, which contains an exhaustive review of the problem and which we think is well reasoned, holds that the unpaid contributions of the employer to the Welfare Fund constitute wage claims entitled to priority under Section 64(a)(2). Its language we deem particularly applicable here; however, to quote it here we feel would serve no useful purpose. Suffice it to say that we approve of it most fully.

4. The question here posed is, therefore, answered in the affirmative.

In accordance with the foregoing opinion the Order of the Referee denying the priority claims of the Trustee of the Welfare Fund of Local Union 111 and the Trustee of the Welfare Fund of Local Union 301 will be vacated.

An appropriate order will be prepared and submitted.

IN UNITED STATES DISTRICT COURT

ORDER REVERSING ORDER OF REFEREE, ETC.—July 5, 1957

AND NOW, TO WIT this 5th day of July, 1957, it is hereby ordered and decreed as follows:

1. The Order of the Referee in Bankruptcy denying the priority claims of the Trustee of the Welfare Fund of Local Union 111 and the Trustee of the Welfare Fund of Local Union 301 is hereby reversed and vacated.

2. The Referee in Bankruptcy is ordered to treat the claims of the Trustee of the Welfare Fund of Local Union 111 and the Trustee of the Welfare Fund of Local Union 301 as priority claims for "wages" within the meaning [fol. 45] of Section 64(a)(2) of the Bankruptcy Act, 11 U. S. C. Section 104(a)(2).

/s/ GEO. G. WELSH.

IN UNITED STATES DISTRICT COURT

STIPULATION—Filed: August 9, 1957

It is hereby stipulated and agreed by and between the parties to this action, Harold K. Wood, United States Attorney in and for the Eastern District of Pennsylvania, Louis C. Bechtle, Assistant United States Attorney for said District, attorneys for the claimant, United States of America, and Wilderman and Markowitz, Esquires, attorneys for the union, that there shall be included in the Court record of the above entitled bankruptcy matter the following written agreements for the reason that the Opinion handed down by The Honorable George A. Welsh on June 28, 1957 indicates by specific reference that these contracts formed an essential basis of His Honor's Opinion and subsequent Order:

1. Agreement dated July 1, 1956 between the Greater Philadelphia Restaurant Operators, Inc. and the Local Joint Executive Board of Philadelphia consisting of the respective Local Unions, numbered 111, 115, 232, and 301, and affiliated with the Hotel and Restaurant Employees

and Bartenders International Union, American Federation of Labor.

2. Agreement dated March 21, 1951 between the Embassy Club, 1418 Spruce Street, consisting of the respective Local Unions, numbered 111, 115, 232, 301, 138, 170, 434, [fol. 46] 568, 677 and 758 affiliated with the Hotel and Restaurant Employees International Alliance and Bartenders International League of America of the American Federation of Labor plus appropriate supplements effective 9/1/51; supplement to Article X, effective 9/1/51 and supplement to Article N, effective January 1, 1953.

3. Agreement and declaration of trust:

(a) Welfare Trust Fund, dated 2/1/51—Waiters and Waitresses Local 301.

(b) Catering Welfare Fund—Waiters and Waitresses Local 301, dated 3/1/54.

4. Agreement and declaration of trust for the chefs, cooks, pastry workers and assistants, Local 111—Welfare Plan, dated 12/13/51.

/s/ HAROLD K. WOOD,
United States Attorney.

/s/ LOUIS C. BECHTLE,
Assistant United States Attorney.

/s/ LOUIS N. WILDERMAN,
WILDERMAN and MARKOWITZ,
ESQUIRES,
Attorneys for the Union.

Approved & Ordered Filed
this 3rd day of August, 1957.

/s/ Geo. A. Welsh,
Judge.
United States District Court.

[fol. 47] • • •

[fol. 48] IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12323

In the Matter of

EMBASSY RESTAURANT, INC.
Bankrupt

UNITED STATES OF AMERICA
Appellant

On Appeal from the United States District Court for the Eastern District of Pennsylvania

PETITION FOR LEAVE TO INTERVENE, FILE A BRIEF AS AMICUS CURIAE AND PRESENT ORAL ARGUMENT—
Filed October 14, 1957

To the Honorable, the Judges of said Court:

The petition of the Philadelphia Joint Board, Amalgamated Clothing Workers of America represents that:

1. Your petitioner is a labor union with its principal office at 2115 South Street, Philadelphia, Pennsylvania.
2. On behalf of the members of said union, your petitioner has duly filed proofs of claim in Padi Clothes, No. 24648, and S. Wachtel & Sons, No. 24582.
3. Said proofs of claim involved a claim by your petitioner for social benefits, constituting a part of the wages due to employees of each of the bankrupt.
4. In the aforesaid cases, the learned Referee has ruled that the determination of the matter is similar to

[File endorsement omitted]

[fol. 49] the above captioned case, in which his honor Judge Welsh of the U. S. District Court for the Eastern District of Pennsylvania has ruled in favor of the said claims.

5. Your petitioner is interested in the subject matter of the instant appeal because of its financial concern in the result of the instant decision, inasmuch as it will control the pending aforementioned two bankruptcy cases.

6. Your petitioner is also interested in the outcome of the above captioned case because of its great concern for employees generally, whom your petitioner feels are entitled to fringe benefits as a portion of their wages due and payable to them, even though said fringe benefits are paid by the employer directly to trustees for sickness and accident funds.

7. Your petitioner has communicated with Harold K. Wood, United States Attorney, counsel for the Appellant United States, Nathan L. Miller, Esquire, counsel for the Appellee Trustee, and Richard H. Markowitz, Esquire, counsel for the Appellee local unions, and subject to the decision of this Honorable Court, each has consented to the filing of a brief Amicus Curiae and the presentation of supporting oral argument by your petitioner.

WHEREFORE, your petitioner prays:

(a). That your Honorable Court permit the petitioner to intervene, as Amicus Curiae, in the above matter; and

(b). That it be permitted to file a brief Amicus Curiae in support of the decision of the lower court within such time as may seeem fit to this Honorable Court, and be orally heard in its support.

AND YOUR PETITIONER will ever pray, etc.

MARKOVITZ, STERN & SHUSTERMAN

By .....

JEROME L. MARKOVITZ, Attorney for Philadelphia Joint Board, Amalgamated Clothing Workers of America

DATED: October 3, 1957

[fol. 50-52] • • •

[fol. 53] UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,323

In the Matter of EMBASSY RESTAURANT, INC.,
Bankrupt

UNITED STATES OF AMERICA,
Appellant

ORDER GRANTING PETITION TO APPEAR AS AMICUS CURIAE, ETC.—October 9, 1957

Present: BIGGS, *Chief Judge* and MARIS and KALODNER, *Circuit Judges*

AND NOW, to wit, this 9th day of October, 1957, the prayer of the petition of Philadelphia Joint Board, Amalgamated Clothing Workers of America, to appear as amicus curiae and to file a brief in that capacity and to participate in the oral argument, be and the same hereby is granted.

By the Court

/s/ BIGGS
Chief Judge

[File endorsement omitted]

[fol. 54-58] • • •

[fol. 59] IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,323

In the Matter of
EMBASSY RESTAURANT, INC.,
Bankrupt

UNITED STATES OF AMERICA,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued January 8, 1958

Before MARIS, McLAUGHLIN and STALEY, *Circuit Judges.*

OPINION OF THE COURT—Filed April 16, 1958

By STALEY, *Circuit Judge.*

The achievement of complete economic security for industrial workers is the ultimate aspiration of the American labor movement. One method of attaining a measure of this security is the union welfare fund maintained to provide employees with life insurance, hospital and surgical benefits, sick pay, and other advantages. Under virtually all arrangements for a welfare fund, the collective bargaining agreement obligates the employer to contribute a certain sum of money periodically to the fund. Whether these employer contributions are entitled to preference under Section 64(a)(2) of the Bankruptcy Act as "wages * * * due to workmen" is the inquiry presented on this appeal.

[fol. 60] The facts are not disputed. A collective bargaining agreement was entered into by the employer and the union on March 21, 1951. After recognizing the union as the exclusive bargaining agent, the agreement dealt with the accustomed provisions relating to discharge, layoffs, seniority, vacations, hours, wages, holidays, and other employment conditions. It contained also provisions for sick leave with pay.

On September 1, 1951, the bargaining agreement was amended to render ineffective the sick leave benefits as to certain types of employees. In this supplemental agreement, the employer agreed to pay a crtain monthly sum into the union welfare fund for each member of the union in its employ.

On July 1, 1956, another collective bargaining agreement was executed providing that the employer pay into the welfare fund monthly the sum of $8.00 for each of its employees who are union members. This was the agreement in effect on the date the employer was adjudged a bankrupt.

A written Agreement and Declaration of Trust, dated December 13, 1951, outlined the administration of the union welfare fund.[1] It provided generally for employee welfare benefits and authorized the trustees to file claims for priority of payment of the employer's contribution to the fund in any proceeding involving an insolvent employer. Finally, it specified the application of Pennsylvania law to any questions involving the trust's validity or administration.

The trustees of the welfare fund filed proofs of claim in the employer's bankruptcy proceeding seeking priority as wage claimants for the unpaid employer contributions to the fund which had accrued in the three months prior to bankruptcy. In the same proceeding, the United States filed a lien claim for unpaid taxes. The referee denied the unpaid employer contributions to the welfare fund the [fol. 61] status of wages within Section 64(a)(2), and relegated the amounts to the status of payments due unsecured creditors. The district court vacated the ref-

[1] There are two trust funds involved in this case, but because the facts of each are the same, we treat them as one.

eree's order and granted wage priority to the employer contributions. 154 F. Supp. 141 (E.D.Pa. 1957). The appeal of the United States followed.

The Chandler Act provides in Section 64(a), 11 U.S.C. § 104(a), for debts which have priority over general unsecured claims, and designates the order of payment, so far as is relevant here, as follows:

> "* * * (2) wages not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt * * * (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof * * *."

It is undisputed that the amounts of unpaid employer contributions do not exceed $600 to each claimant and that the sums were earned within three months of bankruptcy. The narrow issue remaining for determination by this court is whether the employer's payments to a union welfare fund pursuant to a collective bargaining agreement are "wages * * * due to workmen" within the purview of Section 64(a)(2).

The resolution of this precise issue has met with a diversity of judicial opinion in the federal courts. The Second Circuit has dealt with the problem in Local 140 Security Fund v. Hack, 242 F.2d 375, cert. denied, 355 U.S. 833 (1957), where the employer contributions to the fund there involved were denied the status of wage claims. The court decided that if the term "wages" was to be enlarged beyond its normal definition, this was a legislative and not judicial function. The concurring opinion observes that [fol. 62] the fund was not a "workman" within the meaning of Section 64(a)(2). A district court in California arrived at an opposite decision in the case of In re Otto, 146 F. Supp. 786 (S.D.Cal. 1956). There it was held that employer contributions to a welfare fund represented merely another method of computing wages and should therefore be given the wage priority provided for in Section 64(a)(2).

In our own circuit, two district courts have taken opposite stands. The district court in the present case followed the rationale and conclusions of the Otto case, while the district court for the District of New Jersey chose to follow the rule of the Second Circuit in the Hack case. In re Victory Apparel Mfg. Corp., 154 F. Supp. 819 (1957).

Union Funds providing welfare benefits to employees through employer contributions contracted for in collective bargaining agreements play an essential and ever growing part in our industrial economy. We are firmly convinced that unions bargain for these contributions as though they were wages, and further that industry considers the contributions as an integral part of the wage package. See Note, 66 Yale L. J. 449, 460 (1957). The contributions are in a true sense the agreed compensation for services rendered and as such must be considered wages.[2] For this [fol. 63] reason we are constrained to disagree with the view of the Second Circuit in the Hack decision and to affirm the decision of the district court here.

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[2] The National Labor Relations Act makes it an unfair labor practice for an employer to refuse to bargain collectively with respect to "rates of pay, *wages*, hours of employment, or other conditions of employment." 29 U.S.C. §§ 158(a)(5) and 159(a). It has been held that since the benefits of pension and insurance plans are within the scope of the term "wages" the plans are proper subjects of collective bargaining. In the case of Inland Steel Co. v. N.L.R.B., 170 F.2d 247, 251 (C.A. 7, 1948), cert. denied, 336 U.S. 960 (1949), the court quoted from the Board's opinion with approval:

> "'With due regard for the aims and purposes of the Act and the evils which it sought to correct, we are convinced and find that the term "wages" as used in Section 9(a) must be construed to include emoluments of value, like pension and insurance benefits, which may accrue to employees out of their employment relationship. * * * Realistically viewed, this type of wage enhancement or increase, no less than any other, becomes an integral part of the entire wage structure, and the character of the employee representative's interest in it, and the terms of its grant, is no different than in any other case where a change in the wage structure is effected.'"

See also N.L.R.B. v. Black-Clawson Co., 210 F.2d 523 (C.A. 6, 1954); W. W. Cross & Co. v. N.L.R.B., 174 F.2d 875 (C.A. 1, 1949).

Since the opinion in the Hack case was rendered, the Supreme Court has expressed its view of the relationships created by the union welfare funds and the character of the employer contributions to such funds. In United States v. Carter, 353 U.S. 210 (1957), the trustees of a welfare fund sued the employer and his surety to recover unpaid contributions, the action being brought pursuant to the Miller Act, 40 U.S.C. §§ 270a and 270b. That statute requires that a payment bond be furnished by a contractor working on the construction of federal public buildings, and provides that "Every person who has furnished labor * * * and who has not been paid in full therefor * * * shall have the right to sue on such payment bond * * * for the sum or sums justly due him * * *." 40 U.S.C. § 270b(a). The Supreme Court there was confronted with the issues of whether the trustees of the fund could sue as a "person who has furnished labor" and whether the unpaid employer contributions were "sums justly due him." The Court permitted the action and its unanimous opinion bears persuasively on the case here for decision.

The bargaining agreement in the Carter case was similar to the agreement in this case, except that the employer was to pay into the welfare fund 7½ cents for each employee hour worked. The government suggests that when the welfare fund contributions in bargaining agreements are measured by a percentage of the wage earned there exists a basis for distinguishing such an arrangement from the situation where the employer pays a flat monthly sum for every employee. This seems to urge a distinction analogous to the difference between a wage and a salary; Section 64(a)(2) does not make that distinction, and neither do we. The Supreme Court in the Carter case found it unnecessary to decide whether employer contributions to the welfare fund were technically wages as-[fol. 64] signed by the employees. It did decide that the trustees could sue on behalf of the employees to protect the employees' rights. The Court then made the following particularly relevant observation, 335 U.S. at page 220:

> "* * * the trustees of the fund have an even better right to sue on the bond than does the usual assignee

since they are not seeking to recover on their own account. The trustees are claiming recovery for the sole benefit of the beneficiaries of the fund, and those beneficiaries are the very ones who have performed the labor. The contributions are the means by which the fund is maintained for the benefit of the employees and of other construction workers. For purposes of the Miller Act, *these contributions are in substance as much 'justly due' to the employees who have earned them as are the wages payable directly to them in cash.*" [Emphasis supplied.]

Like Section 64(a)(2) of the Chandler Act, the Miller Act sought to protect employees by guaranteeing to them the wages they have earned. We see no reason to treat employer contributions in one way under the Miller Act and in another under the Chandler Act.

The decision of the district Court will be affirmed.

* * * *

[fol. 65] IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,323

In the Matter of EMBASSY RESTAURANT, INC.,
Bankrupt

UNITED STATES OF AMERICA,
Appellant

Philadelphia Joint Board, Amalgamated Clothing Workers of America, *Intervenor*

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: MARIS, MCLAUGHLIN and STALEY, *Circuit Judges.*

JUDGMENT—dated April 16, 1958

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the order of July 9, 1957 of the said District Court in this case be, and the same is hereby affirmed.

April 16; 1958

[File endorsement omitted]

[fol. 66-68] * * *

* * * *

[fol. 69] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 70] SUPREME COURT OF THE UNITED STATES

No. 174, October Term, 1958

UNITED STATES OF AMERICA, PETITIONER

vs.

EMBASSY RESTAURANT, INC., ET AL.

ORDER ALLOWING CERTIORARI. October 13, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1958 486000 575

No. 174

In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, PETITIONER

v.

EMBASSY RESTAURANT, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
MELVA M. GRANEY,
GEORGE F. LYNCH,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

EMBASSY RESTAURANT, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the District Court (R. 41a–44a) is reported at 154 F. Supp. 141. The opinion of the Court of Appeals (Appendix, *infra*, pp. 9–15) is reported at 254 F. 2d 475.

JURISDICTION

The judgment of the Court of Appeals was entered on April 16, 1958. (Appendix, *infra*, pp. 15–16.) The jurisdiction of this Court is conferred by 28 U. S. C. 1254 (1) and 11 U. S. C. 47.

QUESTION PRESENTED

Whether contributions required to be made by an employer to a union welfare fund, pursuant to the

terms of a collective bargaining agreement, are entitled, in bankruptcy, to priority over federal taxes owed by the employer, on the theory that the contributions constitute "wages * * * due to workmen" within the meaning of Section 64a (2) of the Bankruptcy Act, as amended.

STATUTE INVOLVED

Bankruptcy Act, c. 541, 30 Stat. 544 (11 U. S. C. 104):

> SEC. 64 [As amended by Sec. 1, Act of June 22, 1938, c. 575, 52 Stat. 840]. *Debts Which Have Priority.*—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (2) wages, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; * * * (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof * * *.
>
> * * * * *

STATEMENT

On May 21, 1951, Embassy Restaurant, Inc., the bankrupt employer, entered into a collective bargaining agreement with the Local Joint Executive Board of Philadelphia (referred to in the contract and herein as the "Union"), consisting, *inter alia,* of Local Unions Nos. 111 and 301. In that agreement,

the employer recognized the Union as the sole and exclusive bargaining representative of its employees. (R. 41a.)

On September 1, 1951, the bargaining agreement was amended to render ineffective the sick leave benefits as to certain types of employees. In this supplemental agreement, the employer agreed to pay a certain monthly sum into the Union Welfare Fund for each member of the Union in its employ. (R. 5a–8a.)

The agreement contained provisions relating to hours, wages, vacations, holidays, seniority and other conditions of employment. Another provision related to sick leave with pay for seven days each year (which could be accumulated, if not used, to a maximum of twenty-one days). (R. 41a.)

Subsequently, on July 1, 1956, another collective bargaining agreement was executed between the Greater Philadelphia Restaurant Operators, Inc., acting on behalf of Embassy Restaurant, Inc., and other restaurants, and the Union, which provided for contributions to the Welfare Trust Funds of Local Unions 111 and 301. Specifically, it provided that each employer was required to pay the sum of $8 per month for each employee in the collective bargaining unit represented by the Union. This was the agreement in effect on the date the employer was adjudged a bankrupt. (R. 15a, 41a–42a.)

The Welfare Plans were administered pursuant to a formal agreement and declaration of trust. Each trust provided that the term "employee" meant any employee in the collective bargaining unit represented

by the Union, and that the purpose of the Welfare Plan was to provide welfare benefits for eligible employees. The trustee of the Welfare Fund had the right, in his discretion, to file claims in any proceeding in which an insolvent employer was involved, and was obligated to endeavor to have such claims considered and declared to be entitled to priority of payment. Questions pertaining to the validity of the Trust, its construction and administration, were to be determined in accordance with the laws of the Commonwealth of Pennsylvania. (R. 42a.)

Subsequent to the employer's being adjudged a bankrupt, the trustees of the Welfare Funds of Local Unions 111 and 301 filed proofs of claim. In so doing, they asserted status as priority wage claimants, pursuant to the provisions of Section 64a (2) of the Bankruptcy Act, c. 541, 30 Stat. 544, as amended, for payments to the Welfare Funds of the amounts of $216 and $336, respectively, which had accrued in the three-month period prior to the bankruptcy. The Referee denied the claim of priority but allowed the trustees the status of general unsecured creditors. On review, the District Court vacated the order of the Referee and held that the claims of the trustees were priority claims for wages within the meaning of Section 64a of the Bankruptcy Act (R. 42a–45a), thereby giving them preference over the lien claim (R. 31a–33a) which had been filed by the Government for unpaid taxes. The Court of Appeals affirmed. (R. 41a–45a; Appendix, *infra*, pp. 9–16.)

REASONS FOR GRANTING THE WRIT

1. The decision below is in direct conflict with the recent decision of the Court of Appeals for the Second Circuit in *Local 140 Security Fund* v. *Hack*, 242 F. 2d 375, certiorari denied, 355 U. S. 833, with which the Third Circuit (*infra*, p. 13) felt "constrained to disagree". The *Hack* case, *supra*, involved payments, computed upon the basis of the gross payroll of the employees in a bargaining unit, to be made by the employer to a union security fund which had welfare purposes. It was there held (242 F. 2d at 378) that the provisions of the collective bargaining agreement for such payments "created only a debtor and creditor obligation between the employer and third parties, for something other than wages" and that "[t]he language of the statute granting priority to wages cannot be stretched so as to embrace this type of claim." In the Second Circuit's view (*id.*, pp. 377–378), the claim, in order to be entitled to priority under Section 64a (2), must be one for wages originally due to a workman; if the claim was never a part of a workman's wages and was never a sum due to him, it cannot be deemed to fall within the terms of the statute.[1]

Arriving at an opposite result in the instant case, the Third Circuit stated (*infra*, pp. 12–13) that it was

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[1] To similar effect, see the following decisions of the District Courts. *In re Brassel*, 135 F. Supp. 827 (N. D. N. Y.); *In the matter of Sleep Products Inc., Bankrupt*, 141 F. Supp. 463 (S. D. N. Y.); *In re Victory Apparel Manufacturing Corp.*, 154 F. Supp. 819 (D. N. J.). *Contra: In re Otto*, 146 F. Supp. 786 (S. D. Calif.).

"firmly convinced that unions bargain for these contributions as though they were wages, and further that industry considers the contributions as an integral part of the wage package." It concluded (*ibid.*) that the "contributions are in a true sense the agreed compensation for services rendered and as such must be considered wages."

In so holding, the Third Circuit was persuaded, in part, by the decision of this Court in *United States* v. *Carter,* 353 U. S. 210. There, in a suit brought by the trustees of a welfare fund, a surety under a Miller Act bond was held liable on its payment bond for a Government contractor's default on his agreed obligation to contribute the sum of 7½ cents per man-hour to the construction workers' health and welfare fund. The relevant provision of the Miller Act (Section 2 (a) of the Act of August 24, 1935, c. 642, 49 Stat. 793) states that "Every person who has furnished labor * * * and who has not been paid in full therefor * * * shall have the right to sue on such payment bond * * * for the sum or sums justly due him * * *". Pointing out that the parties had stipulated that contributions to the fund were part of the consideration the contractor agreed to pay for the services of laborers on the construction job, and that the relation of the contributions to the work done was reflected in the fact that the contributions were measured by the exact number of hours each employee performed services for the contractor, this Court held (353 U. S. at 220):

> For purposes of the Miller Act, these contributions are in substance as much "justly

due" to the employees who have earned them as are the wages payable directly to them in cash.

As appears from the quoted language, this Court treated the contributions as something other than wages. Indeed, it was required to do so, for the agreement involved expressly stated (*id.*, p. 214) that the contributions "shall not constitute or be deemed to be wages" due the employees. The Court emphasized (*id.*, pp. 217–219) that the Miller Act does not limit recovery on the statutory bond to "wages", but rather provides that every person who has furnished labor and material in the prosecution of the work provided for in the contract shall be "paid in full" and receive all "sums justly due." The *Carter* case, therefore, does not support the decision below.

2. The question presented is an important one from the standpoint of the collection of the federal revenue and the administration of the Bankruptcy Act.[2] During the fiscal years ended June 30, 1955, 1956, and 1957, there were, respectively, 6,320, 7,035 and 7,668 asset cases concluded by the bankruptcy courts under the provisions of Chapters I–VII of the Bankruptcy Act.[3] Most such cases involve both wage and tax claims. And certainly, in the light of the increasing prevalence of union welfare funds, there

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[2] Cf. *Goggin* v. *California Labor Div.*, 336 U. S. 118, 124.

[3] Annual Report of the Director of the Administrative Office of the United States Courts: 1955, p. 234; 1956, p. 282; 1957, p. 246.

can be no doubt that the precise issue here presented will be a constantly recurring one.[4]

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
MELVA M. GRANEY,
GEORGE F. LYNCH,
Attorneys.

JULY 1958.

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[4] At present, we know of four cases within the Third Circuit which will be governed by the instant decision.

APPENDIX

United States Court of Appeals for the Third Circuit

No. 12,323

IN THE MATTER OF EMBASSY RESTAURANT, INC., BANKRUPT

UNITED STATES OF AMERICA, APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued January 8, 1958

Before MARIS, MCLAUGHLIN and STALEY, *Circuit Judges*

Opinion of the Court

(Filed April 16, 1958)

By STALEY, *Circuit Judge.*

The achievement of complete economic security for industrial workers is the ultimate aspiration of the American labor movement. One method of attaining a measure of this security is the union welfare fund maintained to provide employees with life insurance, hospital and surgical benefits, sick pay, and other advantages. Under virtually all arrangements for a welfare fund, the collective bargaining agreement obligates the employer to contribute a certain sum of money periodically to the fund. Whether these employer contributions are entitled to preference under Section 64 (a) (2) of the Bankrupt Act as "wage

* * * due to workmen" is the inquiry presented on this appeal.

The facts are not disputed. A collective bargaining agreement was entered into by the employer and the union on March 21, 1951. After recognizing the union as the exclusive bargaining agent, the agreement dealt with the accustomed provisions relating to discharge, layoff, seniority, vacations, hours, wages, holidays, and other employment conditions. It contained also provisions for sick leave with pay.

On September 1, 1951, the bargaining agreement was amended to render ineffective the sick leave benefits as to certain types of employees. In this supplemental agreement, the employer agreed to pay a certain monthly sum into the union welfare fund for each member of the union in its employ.

On July 1, 1956, another collective bargaining agreement was executed providing that the employer pay into the welfare fund monthly the sum of $8.00 for each of its employees who are union members. This was the agreement in effect on the date the employer was adjudged a bankrupt.

A written Agreement and Declaration of Trust, dated December 13, 1951, outlined the administration of the union welfare fund.[1] It provided generally for employee welfare benefits and authorized the trustees to file claims for priority of payment of the employer's contribution to the fund in any proceeding involving an insolvent employer. Finally, it specified the application of Pennsylvania law to any questions involving the trust's validity or administration.

The trustees of the welfare fund filed proofs of claim in the employer's bankruptcy proceeding, seek-

[1] There are two trust funds involved in this case, but because the facts of each are the same, we treat them as one.

ing priority as wage claimants for the unpaid employer contributions to the fund which had accrued in the three months prior to bankruptcy. In the same proceeding, the United States filed a lien claim for unpaid taxes. The referee denied the unpaid employer contributions to the welfare fund the status of wages within Section 64 (a) (2), and relegated the amounts to the status of payments due unsecured creditors. The district court vacated the referee's order and granted wage priority to the employer contributions. 154 F. Supp. 141 (E. D. Pa. 1957). The appeal of the United States followed.

The Chandler Act provides in Section 64 (a), 11 U. S. C. § 104 (a), for debts which have priority over general unsecured claims, and designates the order of payment, so far as is relevant here, as follows:

> * * * (2) wages not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt * * * (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof * * *.

It is undisputed that the amounts of unpaid employer contributions do not exceed $600 to each claimant and that the sums were earned within three months of bankruptcy. The narrow issue remaining for determination by this court is whether the employer's payments to a union welfare fund pursuant to a collective bargaining agreement are "wages * * * due to workmen" within the purview of Section 64 (a) (2).

The resolution of this precise issue has met with a diversity of judicial opinion in the federal courts.

The Second Circuit has dealt with the problem in *Local 140 Security Fund* v. *Hack,* 242 F. 2d 375, cert. denied, 355 U. S. 833 (1957), where the employer contributions to the fund there involved were denied the status of wage claims. The court decided that if the term "wages" was to be enlarged beyond its normal definition, this was a legislative and not judicial function. The concurring opinion observes that the fund was not a "workman" within the meaning of Section 64 (a) (2). A district court in California arrived at an opposite decision in the case of *In re Otto,* 146 F. Supp. 786 (S. D. Cal. 1956). There it was held that employer contributions to a welfare fund represented merely another method of computing wages and should therefore be given the wage priority provided for in Section 64 (a) (2).

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Union Funds providing welfare benefits to employees through employer contributions contracted for in collective bargaining agreements play an essential and ever growing part in our industrial economy. We are firmly convinced that unions bargain for these contributions as though they were wages, and further that industry considers the contributions as an integral part of the wage package. See *Note,* 66 Yale L. J. 449, 460 (1957). The contributions are in a true sense the agreed compensation for services rendered

and as such must be considered wages.[2] For this reason we are constrained to disagree with the view of the Second Circuit in the Hack decision and to affirm the decision of the district court here.

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[2] The National Labor Relations Act makes it an unfair labor practice for an employer to refuse to bargain collectively with respect to "rates of pay, *wages*, hours of employment, or other conditions of employment." 29 U. S. C. §§ 158 (a) (5) and 159 (a). It has been held that since the benefits of pension and insurance plans are within the scope of the term "wages" the plans are proper subjects of collective bargaining. In the case of *Inland Steel Co.* v. *N. L. R. B.*, 170 F. 2d 247, 251 (C. A. 7, 1948), cert. denied, 336 U. S. 960 (1949), the court quoted from the Board's opinion with approval:

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See also *N. L. R. B.* v. *Black-Clawson Co.*, 210 F. 2d 523 (C. A. 6, 1954); *W. W. Cross & Co.* v. *N. L. R. B.*, 174 F. 2d 875 (C. A. 1, 1949).

shall have the right to sue on such payment bond * * * for the sum or sums justly due him * * *." 40 U. S. C. § 270b (a). The Supreme Court there was confronted with the issues of whether the trustees of the fund could sue as a "person who has furnished labor" and whether the unpaid employer contributions were "sums justly due him." The Court permitted the action and its unanimous opinion bears persuasively on the case here for decision.

The bargaining agreement in the *Carter* case was similar to the agreement in this case, except that the employer was to pay into the welfare fund 7½ cents for each employee hour worked. The government suggests that when the welfare fund contributions in bargaining agreements are measured by a percentage of the wage earned there exists a basis for distinguishing such an arrangement from the situation where the employer pays a flat monthly sum for every employee. This seems to urge a distinction analogous to the difference between a wage and a salary; Section 64 (a) (2) does not make that distinction, and neither do we. The Supreme Court in the *Carter* case found it unnecessary to decide whether employer contributions to the welfare fund were technically wages assigned by the employees. It did decide that the trustees could sue on behalf of the employees to protect the employees' rights. The Court then made the following particularly relevant observation, 335 U. S. at page 220:

> * * * the trustees of the fund have an even better right to sue on the bond than does the usual assignee since they are not seeking to recover on their own account. The trustees are claiming recovery for the sole benefit of the beneficiaries of the fund, and those beneficiaries are the very ones who have performed the labor. The contributions are the means by which the

fund is maintained for the benefit of the employees and of other construction workers. For purposes of the Miller Act, *these contributions are in substance as much "justly due" to the employees who have earned them as are the wages payable directly to them in cash.* [Emphasis supplied.]

Like Section 64 (a) (2) of the Chandler Act, the Miller Act sought to protect employees by guaranteeing to them the wages they have earned. We see no reason to treat employer contributions in one way under the Miller Act and in another under the Chandler Act.

The decision of the district court will be affirmed.

United States Court of Appeals for the Third Circuit

No. 12323

IN THE MATTER OF EMBASSY RESTAURANT, INC., BANKRUPT

UNITED STATES OF AMERICA, APPELLANT

PHILADELPHIA JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, INTERVENOR

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: MARIS, MCLAUGHLIN and STALEY, *Circuit Judges*

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of July 9, 1957, of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF, *Clerk.*

APRIL 16, 1958.

Received and filed Apr. 16, 1958. Ida O. Creskoff, Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1958

No. 174

In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, PETITIONER

v.

EMBASSY RESTAURANT, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 34–36) is reported at 154 F. Supp. 141. The opinion of the Court of Appeals (R. 42–47) is reported at 254 F. 2d 475.

JURISDICTION

The judgment of the Court of Appeals was entered on April 16, 1958. (R. 47–48.) The petition for a writ of certiorari was filed on July 15, 1958, and was granted on October 13, 1958. (R. 48.) The jurisdiction of this Court is conferred by 28 U. S. C., Section 1254 (1) and Section 64 of the Bankruptcy Act, as amended.

QUESTION PRESENTED

Whether contributions required to be made by an employer to a union welfare fund, pursuant to the terms of a collective bargaining agreement, are entitled, in bankruptcy, to priority over federal taxes owed by the employer, on the theory that the contributions constitute "wages * * * due to workmen" within the meaning of Section 64a (2) of the Bankruptcy Act, as amended.

STATUTE INVOLVED

Bankruptcy Act, c. 541, 30 Stat. 544:

> SEC. 64 [As amended by Sec. 1, Act of June 22, 1938, c. 575, 52 Stat. 840]. *Debts Which Have Priority.*—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (2) wages, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; * * * (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof * * *.
>
> * * * * * *

(11 U. S. C. 1952 ed., Sec. 104.)

STATEMENT

The facts are undisputed, and may be stated as follows:

On March 21, 1951, Embassy Restaurant, Inc., the bankrupt employer, entered into a collective bargaining agreement with the Local Joint Executive Board of Philadelphia (referred to in the contract and herein as the "Union"), consisting, *inter alia,* of Local Unions Nos. 111 and 301. In that agreement (see R. 4–6) the employer recognized the Union as the sole and exclusive bargaining representative of its employees (R. 5). The agreement contained provisions relating to hours, wages, vacations, holidays, seniority and other conditions of employment. (R. 5–6, 34.) Another provision related to sick leave with pay. (R. 34.)

This bargaining agreement was subsequently amended by supplemental agreements (see R. 6–7) which were substantially alike except that they applied to the employee-members of different local unions. Under each of these amendments the sick leave benefits provided by the bargaining agreement for the members of Local Unions 111 and 301 became ineffective upon the adoption of a Welfare Plan for the particular union (effective September 1, 1951) pursuant to which the employer, Embassy Restaurant, Inc., agreed to make contributions to a Welfare Trust Fund for that local union.

Subsequently, on July 1, 1956, another collective bargaining agreement (R. 27–31) was executed between the Union (consisting, *inter alia,* of Local Unions 111 and 301) and the Greater Philadelphia Restaurant Operators, Inc., acting on behalf of Embassy Restaurant, Inc., and other restaurants. Under this bargaining agreement, which was the one in effect

when Embassy Restaurant, Inc., was adjudged a bankrupt (R. 34), each employer agreed to pay $8 a month to the Welfare Trust Funds of Local Unions 111 and 301 for each full-time employee member of those local unions (R. 29–30). The agreement stated, among other things, that the trust funds "shall be maintained and utilized to promote Life Insurance, Weekly Sick Benefits, Hospital and Surgical Benefits and other benefits for the employees who are members of Locals 111 * * * and 301 in the employ of the Employer, as in past practice." (R. 30.) Although the agreement contained provisions relating to Sick Leave, it was expressly agreed that those provisions were to be operative only in the event that the Welfare Plans provided in the agreement were not in effect. (R. 29.)

The Welfare Plans for Local Unions 111 and 301 were administered pursuant to formal written agreement and declaration of trust. (R. 34.) Under each trust agreement (see, for example, R. 9–24), the Welfare Plan for the particular union was administered and operated by a Board of Trustees composed of three persons designated by the Executive Board of the Union (R. 11–12), who were authorized to formulate and establish the conditions of eligibility for welfare benefits and, among other things, to control the funds of the Welfare Plan, to require and collect all employer contributions due the Welfare Plan and, in their sole discretion, to maintain any and all actions for legal proceedings necessary for the collection of the employer contributions and file claims in any proceeding in which an insolvent employer was involved (R. 13–15, 20–21). Title to all money, prop-

erty and income paid to or acquired by the Welfare Plan was vested exclusively in the Board of Trustees and no employee or any person claiming by or through any employee had any right, title or interest in the Welfare Plan or any part thereof. (R. 21–22.)

Subsequent to the employer's being adjudged a bankrupt, the trustees of the Welfare Funds of Local Unions 111 and 301 filed proofs of claim. In so doing, they asserted status as priority wage claimants, pursuant to the provisions of Section 64a (2) of the Bankruptcy Act, c. 541, 30 Stat. 544, as amended, for payments to the Welfare Funds of the amounts of $216 and $336, respectively, which had accrued in the three-month period prior to the bankruptcy. The Referee denied the claim of priority but allowed the trustees the status of general unsecured creditors. (R. 35.)

On review, the District Court vacated the order of the Referee and held that the claims of the trustees were priority claims for wages within the meaning of Section 64a of the Bankruptcy Act (R. 37), thereby giving them preference over the lien claim (R. 25–27) which had been filed by the Government for unpaid taxes. The Court of Appeals affirmed (R. 42–48).

SUMMARY OF ARGUMENT

The question in this case is whether trustees of a union welfare fund claiming against a bankrupt business enterprise may avail themselves of the priority accorded by Section 64a (2) of the Bankruptcy Act, as amended, to "wages * * * due to workmen," servants, clerks and salesmen. Contrary to the views of

the Second Circuit, whose position we support, the Third Circuit has answered this question affirmatively.

Any claim to priority over other claimants or creditors must have a clear statutory basis. *Nathanson* v. *Labor Board,* 344 U. S. 25, 29. Here, in our view, such a basis is lacking.

Fringe benefits in the form of payments made to a welfare or insurance fund are not wages in the accepted sense of that term. Moreover, the employer's obligation here is not one which runs to the employees or one which might be enforced by them; the unpaid contributions are not due the workmen but are owed to the trustees of the union welfare fund, albeit that fund is designed to provide ultimate benefits to the employees.

Apart from the fact that the statutory language does not provide adequate support for the trustees' claim, we believe that the trustees are seeking to attribute to Congress a purpose which goes well beyond its contemplation. The provision granting priority in bankruptcy to wages goes back over one hundred years to a period long antedating the negotiation of fringe benefits by labor unions. Such amendments as have been made over the years by Congress have been few and cautious ones: the ceiling on the priority wage claim has been raised (from $25 per claimant in 1841 to the present figure of $600); there have been some shifts in the relative priority position of wages due to workmen; and the protection originally given to workmen has been extended to salesmen. Throughout the history, there is discernible a single and limited purpose—to enable workmen displaced by an em-

ployer's bankruptcy to secure promptly the money directly due them in the form of back pay in mitigation of the hardship which may result from loss of employment. Contrary to the views of the court below, this does not encompass a purpose to grant priority to welfare funds which provide indirect and possibly remote benefits (*e. g.*, compensation for accidents or ill health) that may be wholly unrelated to the fact of an employer's bankruptcy.

In 1934, Congress, by separate and special provision, established a priority for a workman's claim against his employer arising out of a workmen's compensation award. In 1938, Congress eliminated this priority (though a claim for workmen's compensation was continued as a provable claim in bankruptcy). This indicates (a) that Congress does not regard all types of obligations owed by employers to employees as embraced within the concept of wages, and (b) that Congress does not believe that all claims having some connection with the employment relationship are equally entitled to preference.

In some jurisdictions, *e. g.*, the United Kingdom and the State of New York, which have long had provisions granting priority in bankruptcy to wage claims, priority has been granted (more recently) to claims against the employer for unpaid contributions to welfare and insurance funds. Significantly, this has been done by the process of statutory amendment and not by judicial interpretation. A bill along similar lines was recently before Congress but was not acted upon (though we note that such bill, even had it passed, would have covered only contributions—unlike

those here—based upon hours worked or wages paid).

This Court's decision in *United States* v. *Carter*, 353 U. S. 210, does not support the decision below. The issue there was whether trustees of a union welfare fund (a fund comparable to the one involved here) could sue on a Miller Act payment bond undertaking to guarantee laborers and materialmen all sums "justly due" them from a government contractor. The claim was allowed not on the theory that the unpaid contributions were wages, but, rather, on the grounds that the Miller Act has broad protective purposes and that the term "sums justly due" is not restricted to wages.

ARGUMENT

THE PRIORITY ACCORDED "WAGES * * * DUE TO WORKMEN" BY SECTION 64a (2) OF THE BANKRUPTCY ACT DOES NOT ENCOMPASS AN EMPLOYER'S UNPAID CONTRIBUTIONS TO A UNION WELFARE FUND REQUIRED TO BE MADE UNDER THE TERMS OF A COLLECTIVE BARGAINING AGREEMENT

This Court has declared that "The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt's estate among creditors holding just demands * * *"; [1] that, in the execution of that purpose, Congress has established a "reasonable classification of claims as entitled to priority because of superior equities * * *"; [2] and that, if one claimant is to be preferred over others, this "purpose

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[1] *Kothe* v. *R. C. Taylor Trust*, 280 U. S. 224, 227; see, also, *Kuchner* v. *Irving Trust Co.*, 299 U. S. 445, 451, 452; *Sampsell* v. *Imperial Paper Corp.*, 313 U. S. 215, 219.

[2] *Carpenter* v. *Wabash Ry. Co.*, 309 U. S. 23, 28.

should be clear from the statute."[3] Here the question is whether unpaid employer contributions to a union welfare fund have priority over the Federal Government's claim for unpaid taxes. Despite the fact that other claims may not be preferred over the Federal Government's tax claim unless such a purpose is "clear from the statute," the court below accorded priority to the unpaid welfare fund contributions on the theory that those contributions may be "considered wages" (R. 45) and within the category of "wages * * * due to workmen" as that phrase is used in Section 64a (2) of the Bankruptcy Act, as amended (*supra*, p. 2). We believe this theory unsound, as the Second Circuit held in *Local 140 Security Fund* v. *Hack*, 242 F. 2d 375, certiorari denied, 355 U. S. 833, rehearing denied, October 13, 1958, 27 U. S. L. Week 3113.

Since the sense in which the phrase "wages * * * due to workmen" is used in the priority statute depends not only upon the language used but upon the purpose of the law as well, we turn first to a review of the legislative history of the relevant bankruptcy provisions.

A. TO TREAT UNPAID WELFARE FUND CONTRIBUTIONS AS "WAGES * * * DUE TO WORKMEN" WITHIN THE MEANING OF THE STATUTE IS NEITHER CONSONANT WITH THE CONGRESSIONAL USE OF THE WORD "WAGES" NOR WITH THE CONGRESSIONAL PURPOSE IN ACCORDING PRIORITY TO WAGES

The court below treated Section 64a (2) of the Bankruptcy Act as if it were general social legisla-

[3] *Nathanson* v. *Labor Board*, 344 U. S. 25, 29; *Sampsell* v. *Imperial Paper Corp.*, *supra*.

tion rather than a *priority* statute having the limited purpose of furnishing "distressed workers with a cushion of purchasing power against the impact of their employers' bankruptcy."[4] Certainly, there is nothing in the genesis of the statute to suggest that Congress proposed to deal with any phase of employer-employee relationships[5] other than the ordinary matter of workmen's collecting back pay owed personally and directly to them.

The development of this wage priority provision has been slow and cautious. In a period of over one hundred years, the changes have been few: enlargement of the amount of the preferred wage claim from $25 in 1841 to the present $600 limitation; occasional shifts in the position of relative priority; and expansion of the provision to include salesmen.

As pointed out by Collier in his work on Bankruptcy,[6] it was not until the Act of March 2, 1867, c. 176, 14 Stat. 517, that Congress evolved a comprehensive plan for permitting some classes of unsecured creditors to share in the assets of a bankrupt's estate

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[4] *In re Victory Apparel Manufacturing Corp.*, 154 F. Supp. 819, 822 (D. N. J.) (now pending on appeal to the Third Circuit); *In re Brassel*, 135 F. Supp. 827, 829 (N. D. N. Y.); *In the Matter of Sleep Products, Inc., Bankrupt*, 141 F. Supp. 463, 467 (S. D. N. Y.), affirmed *sub nom. Local 140 Security Fund* v. *Hack*, 242 F. 2d 375 (C. A. 2d), certiorari denied, 355 U. S. 833.

[5] *In the Matter of Sleep Products, Inc., Bankrupt*, *supra*, p. 468. See comment on this case in 66 Yale L. J. 449 (1956), where the author states (p. 460) that "[f]rom the standpoint of legislative intent" the *Sleep* opinion appears to be on solid ground.

[6] 3 Collier on Bankruptcy (14th ed., 1941), par. 64.01, pp. 2045–2053.

ahead of, or to the exclusion of, others. The pattern of priority there established governed the provisions of the Bankruptcy Act (Act of July 1, 1898, c. 541, 30 Stat. 544), and with certain changes and amplifications remained the basis of priority distribution under the Chandler Act, the Act of June 22, 1938, c. 575, 52 Stat. 840, presently in force.

With respect to the wage priority provision contained in Section 64a (2) of the present Act, the legislative history shows that Congress first acted in this respect in the Act of August 18, 1941, c. 9, 5 Stat. 440.[7] Section 5 of that Act established three classes of prior claims, the third of which provided that:

> * * * any person who shall have performed any labor as an operative in the service of any bankrupt shall be entitled to receive the full amount of the wages due to him for such labor, not exceeding twenty-five dollars; *Provided,* That such labor shall have been performed within six months next before the bankruptcy of his employer; * * *

Section 28 of the Act of March 2, 1867, *supra,* defined five distinct classes of claims entitled to priority.[8] Granted fourth priority were—

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[7] The first Bankruptcy Act, the Act of April 4, 1800, c. 19, 2 Stat. 19 (repealed by Act of December 19, 1803, c. 6, 2 Stat. 248) contained no wage priority provision.

[8] It is noted that Section 27 of that Act contained an apparently inconsistent priority provision; it provided that on the distribution of the bankrupt's estate all creditors whose debts were duly proved and allowed should be entitled to share in the bankrupt's estate *pro rata,* without any priority or preference whatever, except that debts for wages (as described in Section 28) "shall be entitled to priority, and shall be first paid in full * * *".

> wages due to any operative, clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

The priority provision of Section 64 of the Bankruptcy Act arranged classes of claims in two groups. Subdivision (a) granted a first priority to all taxes—national, state and local. All other debts accorded priority were grouped in subdivision (b), which, after providing for the payment of various costs and expenses of administration, accorded specific priority to—

> wages due to workmen, clerks, or servants which have been earned within three months before the date of commencement of proceedings, not to exceed three hundred dollars to each claimant * * *.

This wage priority provision of the Bankruptcy Act of 1898 was subsequently amended by the Act of June 15, 1906, c. 3333, 34 Stat. 267, which added "traveling or city salesmen" to the types of wage claimants entitled to priority of payment, and by Section 15 of the Act of May 27, 1926, c. 406, 44 Stat. 662, which increased the maximum amount of the wage claim from $300 to $600.

Section 64a as amended by the 1938 Act restated the wage claim, as previously in effect, but improved its relative position by according it second priority as against a fourth priority for federal and local taxes, and broadened the language thereof so as to cover traveling or city salesmen "on salary or commission basis, whole or part time, whether or not selling ex-

clusively for the bankrupt". A recent amendment effected by the Act of July 30, 1956, c. 784, 70 Stat. 725, Section 1, provided that, for purposes of Section 64a (2), the term "traveling or city salesmen" included "all such salesmen, whether or not they are independent contractors selling the products or services of the bankrupt on a commission basis, with or without a drawing account or formal contract".*

Thus, Section 64a (2) of the Bankruptcy Act uses language which dates back to 1841. That language, so far as pertinent here, accords priority to "debts" in a sequence which subordinates Federal and State tax claims to "wages, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the [bankruptcy] proceeding, due to workmen * * *."

In holding that the unpaid welfare fund contributions of the bankrupt, Embassy Restaurant, Inc., are entitled to priority over the Federal Government's claim for unpaid taxes of the bankrupt, the court below based its decision in large part upon its conclusions (R. 45) that "unions bargain for these contributions as though they were wages," that "industry considers the contributions as an integral part of the wage package," and that they must be "considered wages." But the Court cannot be concerned here with the question of how far the word "wages" may be stretched as an abstract proposition or in other contexts. We are here dealing with a statute which specifies the relative priority of claims of classes of

* This amendment was effective only with respect to proceedings commenced on or after July 30, 1956.

creditors. As this Court stated in *Nathanson* v. *Labor Board,* 344 U. S. 25, 28–29:

> The contest is no longer between employees and management but between various classes of creditors. * * * [I]f one claimant is to be preferred over others, the purpose should be clear from the statute. * * *

A purpose to prefer claims for unpaid welfare fund contributions over a federal tax claim is *not* clear. The evidence points the other way.

In the first place, the language of the statute, read in light of the fact that the priority accorded to "wages" dates back to 1841, indicates that Congress used the word "wages" in "its lay and colloquial meaning."[10] Moreover, since welfare funds are of comparatively recent origin, it is also a necessary conclusion that Congress did not legislate with the idea that the word "wages" would cover unpaid contributions to union welfare funds. Indeed, even under more recent legislation in certain other areas, such employer contributions are not treated as wages; under the Internal Revenue Code of 1954, Sections 106 and 3121 (a) (2), they are not taxable income to the employees and are not a part of the employees' base pay for the purpose of computing social security taxes. Under these circumstances, welfare fund contributions certainly cannot be considered "wages" for the purposes of this priority statute unless they are

[10] *In the Matter of Sleep Products, Inc., Bankrupt,* 141 F. Supp. 463, 467–468 (S. D. N. Y.), affirmed *sub. nom. Local 140 Security Fund* v. *Hack,* 242 F. 2d 375 (C. A. 2d), certiorari denied, 355 U. S. 833.

a type of debt claim whose priority would fulfill the Congressional purpose in granting the priority to wages. In our view, they do not fulfill that purpose.[11]

While, with one exception,[12] the reports of the Congressional committees pertaining to the above-mentioned Acts (pp. 11–13) do not state the purpose of the priority provision, that purpose is fairly apparent. Having presumably used the word "wages" in its old and ordinary sense, Congress must have granted the priority to "wages" as a cushion or protection to wage earners in mitigation of the financial hardship caused by sudden unemployment by reason of their employer's bankruptcy. And that is the purpose which the courts have consistently attributed to Congress. Thus, it has been stated that Section 64a (2) was enacted by Congress "in order that workmen or servants, persons of menial position and low income, should receive a priority in bankruptcy due to the fact that they, as a class, could ill afford to be classified as general

[11] Welfare fund contributions are of course quite different from such items of compensation as vacation pay, severance pay, and back pay under the National Labor Relations Act, which have been held to be embraced by the word "wages" as used in Section 64a (2). See cases cited in footnotes 22, 23, and 24, *infra*, p. 26.

[12] The House Report pertaining to the Act of June 15, 1906, *supra*, which added "traveling or city salesmen" to the types of claimants entitled to wage priority, gave as the reason therefor that the federal courts had decided that the original act was not broad enough to include traveling salesmen in the list of those employed by the bankrupt to whom a preference was given, and that traveling salesmen, being away from home a great portion of the time, did not have the opportunity of protecting themselves as did other employees of the bankrupt. H. Rep. 2753, 59th Cong., 1st Sess.

creditors";[13] that it was the purpose of Congress to protect the wages of laborers due them by insolvents since the "laborer is generally dependent upon his wages for livelihood and the support of his family" and since every consideration of morality, as well as public policy, demands that his wages be preserved to him and be given priority "over ordinary commercial claims";[14] that the obvious purpose of according priority to wage claimants was to protect persons dependent upon their wages for livelihood since they can not be expected to know the credit standing of their employer and must accept employment as it comes;[15] that priority of payment was intended "for the benefit only of those who are dependent upon their wages" and who, having lost their employment by the bankruptcy, would be in need of such protection;[16] and that the "intention of Congress was plainly to give special protection to a class of wage-earners who generally have no substantial savings or other reserves to fall back on in case of adversity and therefore cannot afford to lose."[17] In general, therefore, the legislative intent underlying the priority given to

[13] *In re Paradise Catering Corp.*, 36 F. Supp. 974, 975 (S. D. N. Y.), holding that an actress who was a star and principal in a show was not a "workman" or "servant".

[14] *Manly* v. *Hood*, 37 F. 2d 212, 213–214 (C. A. 4th).

[15] *In re Inland Waterways Inc.*, 71 F. Supp. 134 (D. Minn.); *In re Lawson Electric Co.*, 300 Fed. 736 (S. D. N. Y.).

[16] *Blessing* v. *Blanchard*, 223 Fed. 35, 37 (C. A. 9th), holding that a general manager of a business did not require such special protection.

[17] *In re Estey*, 6 F. Supp. 570 (S. D. N. Y.), holding that a teacher was a professional worker, and not a workman, clerk, salesman, or servant.

certain types of wage claims "is to furnish workers in the lower economic echelons with a protective cushion against the shock of their employers' bankruptcy."[18] As the District Court pointed out in *In the Matter of Sleep Products, Inc., Bankrupt*, 141 F. Supp. 463, 467 (S. D. N. Y.), affirmed *sub nom. Local 140 Security Fund* v. *Hack*, 242 F. 2d 375 (C. A. 2d), certiorari denied, 355 U. S. 833, rehearing denied, October 13, 1958, the reasoning underlying the legislative purpose was (1) that subordinate working men and menial servants depend for their subsistence upon their uninterrupted daily or weekly earnings; (2) that they have inadequate reserves to fall back upon when they are discharged by their employer's business failure and while they are seeking new employment; and (3) that their original choice of employment was relatively limited in scope and, therefore, it would be unrealistic and unfair to make them bear the full credit risk of their employer's bankruptcy.

It follows that the priority accorded to "wages" was granted for a purpose which welfare fund contributions do *not* fulfill—to provide direct financial assistance to employees forced out of work by their employers' bankruptcy. The considerations of public policy and legislative purpose which are inherent in

[18] *In re Victory Apparel Manufacturing Corp.*, 154 F. Supp. 819, 822 (D. N. J.) (now pending on appeal to the Third Circuit); *In re Brassel*, 135 F. Supp. 827, 829 (N. D. N. Y.); *In the Matter of Sleep Products, Inc., Bankrupt*, 141 F. Supp. 463, 467 (S. D. N. Y.), affirmed *sub nom. Local 140 Security Fund* v. *Hack*, 242 F. 2d 375 (C. A. 2d), certiorari denied, 355 U. S. 833.

the priority statute do not encompass an employer's unpaid contributions to a union welfare fund, as the District Court pointed out in *In the Matter of Sleep Products, Inc., Bankrupt, supra.* See, also, *In re Victory Apparel Manufacturing Corp.*, 154 F. Supp. 819 (D. N. J.).

The unpaid welfare fund contributions involved in the present case do not represent direct financial benefits to employees; they are payable to the trustees of the welfare fund, not to the employees. The individual employee's interest is that contributions to the fund become a source of possible welfare benefits, such as insurance, sick, hospital and surgical benefits, for which the employee might become eligible according to the conditions formulated and established by the trustees of the welfare funds. (R. 13, 21–22, 30.) The welfare fund contributions, if given priority, would not result in any *assured* benefit to employees, even indirectly, upon the bankruptcy of the employer. Whether or not a particular employee receives anything from the welfare fund upon the bankruptcy of the employer is speculative and depends upon conditions which have no relation to the bankruptcy of the employer. Even assuming that some indirect benefit or benefits might accrue to the employees shortly after the employer's bankruptcy, it can hardly be assumed that the welfare fund would be so depleted at the time of the bankruptcy that priority of unpaid contributions of the employer is necessary in order to assure such indirect benefits.

B. IT MAY BE PROPERLY ASSUMED THAT CONGRESS WOULD HAVE SPECIFICALLY PROVIDED FOR THE PRIORITY OF UNPAID WELFARE FUND CONTRIBUTIONS IF IT HAD INTENDED SUCH CONTRIBUTIONS TO HAVE PRIORITY

Although the priority statute has been amended several times over the years, Congress has not acted with relation to unpaid welfare fund contributions. It may be assumed that it would have done so had it intended such contributions to have priority. In this connection, it is suggestive that Congress, at one time, passed legislation granting preferred status to workmen's compensation claims.

By Section 4 (a) and (b) of the Act of June 7, 1934, c. 424, 48 Stat. 911, 924, which amended Section 63 (a) of the Bankruptcy Act, Congress specifically established and allowed a priority for workmen's compensation claims. The amendment effected by Section 4 (a) provided (clause (6)) that claims founded upon an award of an industrial accident commission of a state under workmen's compensation laws were provable claims in bankruptcy. Section 4 (b) provided that such claims "shall have the priority provided for in clause (7) of section 64 (b) of such Act of July 1, 1898, as amended". Section 64 (b), as amended by Section 15 of the Act of May 27, 1926, *supra,* in clause (7) accorded priority to "debts owing to any person who by the laws of the States or the United States is entitled to priority". Although the provision allowing proof of industrial accident commission awards was retained in Section 63 (a) as amended by the 1938 (Chandler) Act, the priority previously accorded was omitted.

Since industrial accident awards are somewhat similar in nature to union welfare benefits, the fact that Congress at one time specifically legislated a priority in bankruptcy proceedings for the former, and thereafter saw fit to omit that priority, is persuasive that Congress has been disposed to allow preference to workmen only in relation to claims which are strictly for back pay. As the Second Circuit has stated, where Congress intended that allowances should be made it has carefully enumerated them, and any omissions must be construed as express exclusions. *Guerin* v. *Weil, Gotshal & Manges,* 205 F. 2d 302, 304 (C. A. 2d); *In re Friedman,* 232 F. 2d 151, 152 (C. A. 2d), certiorari denied *sub nom. Klein* v. *Brandt & Brandt Printers, Inc.,* 352 U. S. 835.

Congress could, of course, broaden the categories of priorities so as to include other types of claims by employees or employee organizations. It could give to claims by union welfare funds a preferred status, just as it accorded such status at one time to employees' workmen's compensation claims. Such a proposal, indeed, was recently before Congress in the form of a proposed amendment to the Bankruptcy Act. The bill was not acted upon. Moreover, it is noteworthy that, had it been enacted, it would not have been broad enough to cover the particular claims made by the union welfare funds in the instant case.[19]

[19] The bill, H. R. 8805, 85th Cong., 1st Sess., provided for amending Section 64a (2) of the Bankruptcy Act to add the following:

> and, further, for the purpose of establishing priority under this clause and for computation of the maximum claim to which priority can be given, payments due to any fund or

Congress is not alone in treating "wages" in a priority statute as not including fringe benefits. Under the Bankruptcy Laws of England, equal priority is accorded, by separate provisions, to "wages or salary of any clerk or servant" and to "wages of any labourer or workman" due for services rendered to the bankrupt during the four months preceding bankruptcy, but not exceeding £200.[20] Nevertheless, *another* provision accords priority to insurance contributions, *i. e.*, all amounts due in respect of contributions payable during the twelve months before the date of bankruptcy by the bankrupt as the employer of any person for industrial injuries insurance or for national insurance. The priority accorded to those insurance contributions was established by the

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plan established for the purpose of providing employee benefits, *which are based upon hours worked or wages paid*, shall, *if such payments would qualify as deductible from the employer's gross income under the provisions of the Internal Revenue Code*, be deemed to be wages assigned to the fund or plan by the individual employees upon whose service or wages such payments are based. [Italics supplied.]

Such a bill, if passed, would not accord priority to the type of unpaid welfare fund contributions involved in the present case, if for no other reason than that the contributions here are not "based upon hours worked or wages paid."

[20] The law of bankruptcy in force in England was enacted by the Bankruptcy Act of 1914 (4 and 5 Geo. 5 c. 59) and the Bankruptcy Act of 1926 (16 and 17 Geo. 5 c. 7), which together form a substantially complete code. However, those Acts have been amended by other acts, some of which have added to the priorities established in Section 33 of the 1914 Act with respect to the distribution of the property of a bankrupt. 2 Halsbury's Laws of England (3d ed.), Sec. 464, p. 251. The preferred debts are set forth in 2 Halsbury's Laws of England, *supra*, Sec. 963, pp. 486–489.

National Insurance (Industrial Injuries) Act, 1946 (9 and 10 Geo. 6 c. 62), S. 71 (2), and the National Insurance Act, 1946 (9 and 10 Geo. 6 c. 67), S. 55 (2). The purpose of the former Act, as described in its heading, was to substitute for certain Workmen's Compensation Acts

> a system of insurance against personal injury caused by accident arising out of and in the course of a person's employment and against prescribed diseases and injuries due to the nature of a person's employment, and for purposes connected therewith.

The purpose of the latter Act is described as follows:

> [T]o establish an extended system of national insurance providing pecuniary payments by way of unemployment benefit, sickness benefit, maternity benefit, retirement pension, widows' benefit, guardian's allowance and death grant, to repeal or amend the existing enactments relating to unemployment insurance, national health insurance, widows', orphans' and old age contributory pensions and non-contributory old age pensions, to provide for the making of payments towards the cost of a national health service, and for purposes connected with the matters aforesaid.

It is apparent, therefore, that although the British Bankruptcy Act provision establishing priority with respect to the "wages of any labourer or workman" is substantially the same as Section 64a (2) of our Bankruptcy Act, it was nevertheless deemed necessary to enact a special provision according priority to

claims similar to those union welfare benefits for which priority is claimed here.

The State of New York has also taken action reflecting an understanding that unpaid welfare fund contributions are not in the classification of "wages", as used in a priority statute. In 1952, New York amended its laws so as to grant a preference, in the administration of the estate of an employer who made a general assignment for the benefit of his creditors, to claims of welfare funds for unpaid sums due from the employer. Thus, the definition of "wages or salaries" contained in Section 22 of the Debtor and Creditor Law, McKinney's Consolidated Laws, c. 12, was amended [21] so as to include "employer contributions to or payments of insurance or welfare benefits" and "employer contributions to pension or annuity funds". Prior to the amendment, it had been held that claims for money due for welfare payments were not preferred claims under the statute, even though the amount thereof was computed by a percentage of wages, since it was not deducted from the employee's wages but was merely a matter of contract between the employer and the union. *Matter of Hollywood Commissary* (*Weintraub*), 195 Misc. 441, 87 N. Y. S. 2d 625; *Matter of Well Bilt Box Spring Corp.* (*Bayer*), 196 Misc. 848, 849, 89 N. Y. S. 2d 768. But see *In re Seaboard Furniture Mfg. Corp.* (*Frey*), 89 N. Y. S. 2d 747.

Apart from the fact that the word "wages" in a priority statute has been widely interpreted as not in-

[21] By Laws of New York, 1952, c. 794, Sec. 1, effective July 1, 1952.

cluding unpaid welfare contributions, it should be noted that there are numerous types of bargaining agreements containing provision for payments to welfare funds. As the Second Circuit observed in *Local 140 Security Fund* v. *Hack*, 242 F. 2d 375, 377, certiorari denied, 355 U. S. 833, rehearing denied, October 13, 1958, to ascribe a broader purpose to the wage priority than is indicated by the language and history of Section 64a (2) would lead to as many judicial opinions as there are different forms of collective bargaining agreements containing such provisions. Accordingly, as that court concluded (p. 379), if employer contributions to union welfare funds are to be given priority as a claim for "wages" under Section 64a (2) of the Bankruptcy Act, "that should be done through the legislative action of the Congress, and not by any judicial mislabeling of such payments as 'wages' ". Such was also the conclusion of the District Courts in *In re Victory Apparel Manufacturing Corp., supra,* pp. 822–823, and in the *Hack* case (under the title *In the Matter of Sleep Products, Inc., Bankrupt,* 141 F. Supp. 463). The reasons for this were well stated by the District Court in the latter case as follows (p. 470):

> If the definition of wage claims within section 64, sub. a (2) is to be expanded, that result should be achieved by the method of Congressional amendment. That technique of law revision would afford the opportunity for full debate by labor unions, credit associations, bankruptcy law experts and others. It would permit Congress to adjust, deliberately, competing economic interests and conflicting social

and public policies. It would avoid uncertainty in a relatively new and expanding field of management-labor relations, where there is no standardization in the form and character of union welfare funds and where there is an absence of state regulation. It would enable Congress to explore the impact of the suggested new definition upon the administration of such other statutes as the Taft-Hartley Act.

C. THE BANKRUPT EMPLOYER'S OBLIGATION FOR UNPAID WELFARE FUND CONTRIBUTIONS IS NOT THE TYPE OF DEBT WHICH THE LANGUAGE OF THE PRIORITY STATUTE CONTEMPLATES

The "debt" which has priority under Section 64a (2) of the Bankruptcy Act, so far as pertinent here, is for "wages, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the [bankruptcy] proceeding, due to workmen * * * ." To give unpaid welfare fund contributions priority thereunder plainly requires a strained construction of the statute—one which accords priority to *third* parties (the trustees of the welfare fund) to the extent of $600 of the *composite* contributions payable by the employer ($8 a month per employee).

This Court declared in *Shropshire, Woodliff & Co.* v. *Bush*, 204 U. S. 187, 189, that the statutory words "seem to be merely descriptive of the *nature* of the *debt* to which priority is given" (italics supplied). Unpaid welfare fund contributions may, in a very broad sense, be called amounts "due to workmen", as the Court said in another connection in *United States* v. *Carter*, 353 U. S. 210 (discussed *infra*, pp. 31–33), but this priority statute is concerned with debts due *directly*

to employees. As the Third Circuit stated in *In re Ko-Ed Tavern*, 129 F. 2d 806, 809, with respect to the priority of a wage claim under the 1938 Act, "the fundamental criterion is the relationship which the claimant bore to the bankrupt." The Second Circuit similarly held in *Local 140 Security Fund* v. *Hack*, 242 F. 2d 375, 377–378, certiorari denied, 355 U. S. 833, rehearing denied, October 13, 1958, that in order to be entitled to priority under Section 64a (2) a claim must be one which "in its origin" was for wages due to a workman and, if it was never such, "no theory of an indirect conditional benefit to him" can give it priority. In brief, the debt must arise from a master-servant or employer-employee relationship, rather than from a relationship of debtor and creditor as between the employer and a third party or parties.

While the language of the priority statute may be satisfied when the employee's claim relates to items of compensation such as vacation pay,[22] severance pay,[23] and back-pay awards under the National Labor Relations Act,[24] it is not satisfied where the claim is for unpaid welfare fund contributions. The relationship here is one of debtor and creditor between the employer and third parties (the trustees of the welfare

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[22] *Division of Labor Law Enforcement* v. *Sampsell*, 172 F. 2d 400 (C. A. 9th); *United States* v. *Munro-Van Helms Co.*, 243 F. 2d 10 (C. A. 5th); *In re Public Ledger*, 161 F. 2d 762 (C. A. 3d); *In re Wil-Low Cafeterias*, 111 F. 2d 429 (C. A. 2d).

[23] *McCloskey* v. *Division of Labor, Etc.*, 200 F. 2d 402 (C. A. 9th).

[24] *Nathanson* v. *Labor Board*, 344 U. S. 25; *National Labor Relations Board* v. *Killoren*, 122 F. 2d 609 (C. A. 8th), certiorari denied, 314 U. S. 696; *Kavanas* v. *Mead*, 171 F. 2d 195 (C. A. 4th).

fund). The employees were never entitled to enforce the employer's obligation and they never had any right, title or interest in the welfare fund other than in relation to their eligibility for such welfare benefits as might be established. (R. 21–22.) The unpaid employer contributions to the welfare fund are nothing more than ordinary commercial claims due to independent entities, albeit designed for use for employee welfare purposes. This is far removed from the type of employer-employee debt contemplated by the priority statute.

The language of the statute cannot be stretched on the theory that a bankruptcy court is a court of equity. The exercise of its equitable powers must be strictly confined within the prescribed limits of the Bankruptcy Act. *Young* v. *Higbee,* 324 U. S. 204, 214. The right to priority of payment, therefore, results from the Act and cannot be enlarged by contract or extended under general equitable principles. *United States* v. *Munro-Van Helms Co.,* 243 F. 2d 10, 12 (C. A. 5th); *In re Newark Shoe Stores,* 3 F. Supp. 293 (D. Md.); *Southern Bell Telephone & Telegraph Co.* v. *Caldwell,* 67 F. 2d 802 (C. A. 8th). Any right to priority must be found in the language of the statute. *In re Wilkes-Barre & E. R. Co.,* 46 F. Supp. 12 (M. D. Pa.).

D. THE SECOND CIRCUIT'S VIEW SHOULD BE FOLLOWED

The precise question presented in this case was the subject of decision by the Second Circuit in *Local 140 Security Fund* v. *Hack, supra,* and by several District Courts. Except for the decisions in the present case and the clearly distinguishable decisions in *In re Otto,*

146 F. Supp. 786 (S. D. Cal.) and *In re Ross*, 117 F. Supp. 346 (N. D. Cal.),[25] those courts which have passed on the question have held that employer contributions to union welfare plans are not "wages * * * due to workmen" under Section 64a (2). *In the Matter of Sleep Products, Inc., Bankrupt, supra; In re Brassel*, 135 F. Supp. 827 (N. D. N. Y.); *In re Victory Apparel Manufacturing Corp., supra.*

The *Local 140 Security Fund* case involved payments, computed upon the basis of the gross payroll of the employees in a union bargaining unit, which the employer was required to make to a union welfare fund whose welfare purposes[26] were similar to those

[25] In *In re Otto*, *supra*, the employer contribution to a union welfare fund came from *setting aside* for such purpose (146 F. Supp. at 788) "specified portions (originally five cents and later six cents per hour) of cost-of-living wage increases" obtained after collective bargaining following annual wage reopenings. The basic fact warranting priority of such a claim under Section 64a (2) lay in the fact that "in its origin" it was one for wages due to workmen. This is also true with respect to the case of *In re Ross*, *supra*, where employees who entered into a voluntary plan of disability insurance consented to wage *deductions* for the payment of disability insurance premiums. As the court there stated (117 F. Supp. at 348) "The debt of the bankrupt was incurred for services which they rendered, and not for insurance benefits". In both the *Otto* and *Ross* cases the decisions also rested in part on the fact that under California law there could be a valid assignment of wages to the welfare funds. Both cases are distinguishable on their facts from the instant case, where the claim did not originate as one for wages due to workmen but rather constituted an ordinary commercial claim arising from a debtor-creditor relationship. Cf. *McKee* v. *Paradise*, 299 U. S. 119; *In re Flick*, 105 Fed. 503 (S. D. Ohio).

[26] The opinion of the District Court therein recites (141 F. Supp. 463, 465) that, under the terms of the trust agreement under which that Fund was organized, the Fund undertook

here involved. As appears from the District Court's opinion (141 F. Supp. 463, 465), under the express terms of the trust agreements setting up the claimant fund "neither the employer nor the individual employee have [sic] any right, title or interest in or to any part of the trust estate or fund so created, except such rights as might accrue to an employee under an insurance policy or for other welfare benefits." The Second Circuit held that (242 F. 2d at 378) the required payments did not constitute "wages * * * due to workmen" within the priority provision of Section 64a (2),[27] but, rather, that they "created only a debtor and creditor obligation between the employer and third parties, for something other than wages." "The language of the statute," it concluded, "cannot be stretched so as to embrace this type of claim".

In the *Brassel* and *Victory Apparel* cases, *supra,* the agreements providing for employer contributions to union welfare funds were also similar to those in the instant case, except that in those cases the contributions were based upon percentages of wages paid the employees. The agreement in the *Brassel* case provided that the employee had no right, title or interest in any part of the trust estate except such rights as might accrue to him under an insurance

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to finance various types of social insurance for employees in the bedding industry, including but not limited to life insurance, accident and health insurance, insurance for medical care and hospitalization, and disability benefit insurance.

[27] In a concurring opinion, Judge Hincks stressed that the statutory priority could not be accorded to the Fund because it was "self-evident" that the Fund was not a *workman* within the meaning of the Act 242 F. 2d at 378.

policy or other welfare benefits; that no employee had any option to receive any part of the employer's contribution in lieu of the benefits provided by the trustees;[28] and that such rights were not assignable. In addition to provisions similar to the last two noted above, the trust agreement in the *Victory Apparel* case provided that neither the employer nor any member of his family had any right to receive any cash consideration in lieu of the benefits provided, either upon the termination of the trust or through severance of employment or otherwise. In the latter case, the District Court of New Jersey subscribed to the reasoning and conclusion reached by the Second Circuit in the *Local 140 Security Fund* case, *supra*. In the *Brassel* case, the court, in denying the priority claims asserted by the trustees of the welfare fund, concluded (p. 830) that even the most liberal construction "of the term 'wages' does not justify a nullification of the language of the statute which grants priority only to 'wages * * * due to workmen'"; that, since the employer's contribution was never due to the employee, the employee could not enforce the employer's liability therefor; and that the employee never had an individual or assignable proprietary

[28] The contributions were to be used to provide and pay for premiums upon policies of accident, health and group life insurance or for direct payment of medical and hospitalization expenses of members of the union and whether or not covered by collective bargaining agreements between employers and the union (pp. 828–829).

interest in the contribution or the fund of which it became a part.[29]

The reasoning of the courts in the above-mentioned cases is equally applicable under the facts of this case. Here, the trust agreement expressly provided (R. 21–22) that the monies paid into the Plan "shall not constitute or be deemed monies due to the individual Employees"; that title thereto vested exclusively in the trustees; that neither the employee nor any person claiming by or through an employee had any right, title or interest in the Welfare Plan or any part thereof; and that the trustees were the persons empowered to enforce payment of the employer contributions. The trustees had absolute discretion in the administration of the Welfare Plan, and were not liable for the proper application of any part thereof, in the absence of wilful misconduct, bad faith, or gross negligence. (R. 18.) It does not appear that the individual employees or their families had any right to receive cash or other direct benefits. To grant priority status in these circumstances would be to "redesign the statutory pattern" of Section 64a (2). *In the Matter of Sleep Products, Inc., Bankrupt, supra,* p. 469.

E. THIS COURT'S *CARTER* DECISION DOES NOT SUPPORT THE HOLDING OF THE COURT BELOW

The question in *United States* v. *Carter,* 353 U. S. 210, was the extent of a surety's liability under a Miller Act payment bond. The Miller Act, c. 642, 49

[29] The decision in the *Brassel* case, was the subject of a favorable comment in a note in 34 Chicago-Kent L. Rev. 235 (1956) and of a critical comment in 19 Ga. Bar J. 107 (1956).

Stat. 793, provides that before any contract exceeding $2,000 for the construction of any public work of the United States is awarded to any person, such person shall furnish to the United States a payment bond with a satisfactory surety. The Act grants to every person who has furnished labor or material in the prosecution of the contract work, and who had not been paid in full therefor, the right to sue on such payment bond "for the sum or sums justly due him." In *Carter*, a government contractor had defaulted on his obligation to contribute to a construction workers' health and welfare fund established under a collective bargaining agreement. The purpose and nature of the fund, the powers of the trustees, and the rights of the employees were substantially the same as they are in the present case. This Court's holding sustained the right of the fund's trustees to collect from the surety for the contractor's default in contributions.

It is to be emphasized that the decision does not reflect a holding that the contributions were part of the construction workers' "wages." Indeed, as this Court stated (p. 214), the trust agreement expressly provided that the contributions "shall not constitute or be deemed to be wages." The Court did not find this a crucial consideration because, as it observed (p. 217), the Miller Act "does not limit recovery on the statutory bond to 'wages'." The statute, having broad protective purposes, grants a right to recover all sums "justly due." "For purposes of the Miller Act," the Court concludes (p. 220), the contributions, having been bargained for, "are in substance as much 'justly due' to the employees who have earned them as are

the wages payable directly to them in cash." In other words, the contributions, though not wages, are "justly due" and within the scope of the Miller Act.

Carter thus furnishes no support for concluding either (a) that such contributions are "wages" or (b) that all sums which are "justly due" employees or their representatives are entitled to priority in bankruptcy.

It is apparent, in our view (see *supra,* pp. 9–18), that Congress had a limited purpose in according wages due workmen a priority over other amounts due to persons claiming against the bankrupt: granting to workmen a priority for their back pay would serve as a cushion against the hardship which might result from the need to secure another job. This does not justify the conclusion that Congress has granted to all claims by or on behalf of employees priority over all claims justly made by all other claimants. Priorities may be allowed by the bankruptcy court only to the extent clearly provided by the legislature.

The court below has implied, though, as we see it, without any justification in the legislative background or history, that the wage priority provision of Section 64 has a most comprehensive purpose.[30] It relates

[30] Cf. *In re Otto*, *supra*, p. 789, where the court was persuaded by the circumstance that, in the absence of specific exception, employers' health and welfare contributions have been held to constitute wages within the meaning of the Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (*Inland Steel Co.* v. *National Labor Relations Board*, 170 F. 2d 247 (C. A. 7th), certiorari denied, 336 U. S. 960; the Social Security Act (*MacPherson* v. *Ewing*, 107 F. Supp. 666 (N. D. Cal.); and the Federal Employment Tax Act (*City of Avalon*, 156 F. 2d 500 (C. A. 9th). That

Section 64a (2) to what it describes (R. 42) as "the ultimate aspiration of the American labor movement," namely, the "achievement of complete economic security for industrial workers." This appears from its statements (*ibid.*) that "One method of attaining a measure of this security is the union welfare fund maintained to provide employees with life insurance, hospital and surgical benefits, sick pay, and other advantages"; that under virtually all arrangements for a welfare fund the collective bargaining agreement obligates the employer to contribute a certain sum of money periodically to the fund; and that these union funds "play an essential and ever growing part in our industrial economy" (R. 45). This broad view of the objectives of the labor movement may well be sound and the objectives may well be worthy. If Congress should be of the view that it should seek to promote through the bankruptcy laws maximum security for industrial workers, it might, perhaps, at some future date, choose to lift the present $600 ceiling on priority claims for wages due workmen. But that would be a judgment for Congress to make. Similarly, we think, it is for Congress to decide whether the concept of wages due to workmen—a

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court also "buttressed" its decision by adverting to the fact that such contributions were specifically excepted from an employee's gross income by Section 106 of the Internal Revenue Code of 1954, and are not deemed a part of an employee's base pay for the purpose of computing social security taxes under Section 3121 (a) (2) of that Code. Cf. the *Sleep Products* case, *supra*, where the court thought, as we do (*supra*, p. 14), that these latter two considerations supported its conclusion that such contributions were *not* "wages" under Section 64a (2) of the Bankruptcy Act.

concept which had its genesis in provisions more than one hundred years old—is now to be extended so as to take in contributions which are not, properly speaking, wages and which are not made to workmen but to union welfare fund trustees.[31] A proposal to do this has been before Congress and will doubtless be made again. If a change is to be made, however, it should be made, we believe, by means of legislation.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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NOVEMBER 1958.

[31] Welfare and insurance funds are, of course, of many types. They do not necessarily provide unemployment benefits. Thus, there is no indication that such benefits are provided by the funds here involved. It cannot be assumed, then, that to grant preferred status to all funds would be to serve the object which lies at the root of Section 64a (2), *i. e.*, to tide over the displaced worker. Indeed, in situations where the bankrupt's assets are insufficient to meet all claims for back pay, the tendency would be in the other direction.

IN THE

Supreme Court of the United States

No. 174

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, *Petitioner*

v.

EMBASSY RESTAURANT, INC., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE WELFARE FUNDS—RESPONDENTS

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BRIEF FOR THE WELFARE FUNDS—RESPONDENTS

QUESTION PRESENTED

Whether payments made by an employer to a union welfare fund at the request of his employees pursuant to a collective bargaining agreement, under which the employees gave up their paid sick leave benefits in return for payments to the welfare fund which provided life insurance, hospitalization and accident benefits to them, are "wages . . . due to workmen, servants, clerks" and thus entitled to priority within the meaning of Section 64(a)(2) of the Bankruptcy Act.

SUMMARY OF ARGUMENT

This case involves the question of whether the expression "wages due to workmen" in Section 64(a)(2) of the Bankruptcy Act is to be given the strict and limited construction sought by the Government or whether it is to be interpreted in accordance with the realities of our economic life in the manner of the court below. The exact issue is whether employer contributions to a welfare fund established by collective bargaining agreement are entitled to preference under Section 64(a)(2) of the Bankruptcy Act as "wages . . . due to workmen . . ."

We believe that it would be of some benefit to the Court to consider briefly the place of welfare funds in our industrial economy. The protection of the employee and his family against the ravages of illness, hospitalization, unemployment and death is now generally recognized as a necessary benefit deriving from the employment relationship. One of the recent aims of organized labor has been to provide its members with coverage and protection against these adversities.

Welfare plans were created to serve this purpose. They grew particularly in recent years when direct wage increases were regulated and controlled, and fringe benefits were treated more favorably by governmental authorities.[1]

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[1] The Final Report of the Senate Committee on Labor and Public Welfare, 84th Congress, 2d Session, Senate Report No. 1734, ascribed the growth of welfare and pension plans to a natural human desire for security against illness, unemployment, old age and death, and sets forth four other factors contributing to this growth. They are:

1. High corporation taxes since World War II with tax deductions permitted for these contributions;
2. Wage stabilization programs which have frozen wage rates, but permitted "fringe" benefits of this sort;
3. Court decisions that welfare and pension matters were bargainable issues;
4. The attempt of labor unions to obtain and expand coverage for their members under these programs.

Such welfare programs provide employees, their families and dependents with medical or hospital care, sickness and accident insurance, life insurance coverage and other forms of benefits. Under collective bargaining agreements at the end of 1954 approximately twenty-nine million individuals received hospitalization coverage and over eleven million were provided with life insurance or death benefits.[2]

In early 1954, at least 11,290,000 workers (excluding government and railroad employees) were benefited by welfare plans under collective bargaining contracts. *Health, Insurance and Pension Plans in Union Contracts.* Bureau of Labor Statistics Bulletin 1137 (1955). At that time approximately 70 percent of all workers under collective bargaining agreements were provided with at least one type of health, insurance or pension benefits. Of the workers covered by insurance plans 62.1 percent of the plans were supported entirely by employer contributions. In the pension field 84.7 percent of all employees were covered by plans providing only for employer contributions. In both instances the bulk of the remaining workers were covered

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[2] The Senate Labor Committee Report, Welfare and Pension Plans Investigation, 84th Congress, 2d Session, Senate Report No. 1734, contains in Appendix I, page 82, a statistical table which is reproduced here in part:

Estimated number of employees and their dependents covered under private employee welfare and pension plans, end of 1954 (In thousands)

(Under collective bargaining)

	Employees	*Dependents*	*Total*
Life insurance & death benefits	11,000	300	11,300
Accidental death & dismemberment	6,000		6,000
Temporary disability benefits and sick. leave	10,000		10,000
Hospitalization	12,000	17,000	29,000
Surgical	11,000	15,000	26,000
Medical	6,500	8,300	14,800
Major medical	not available		
Pension Plans	7,200		7,200

by plans calling for contributions by both employers and employees. Only in a few instances did the plans call only for employee contributions. *Rowe, Health, Insurance and Pension Plans in Union Contracts*, Vol. 78, Monthly Labor Review, pp. 993-1000.

Thus, welfare plans have come into wide prominence since World War II and exist today in almost all of the nation's major industries. It is clear that welfare and pension benefits occupy a firm and expanding position in our industrial economy. It is recognized that the protection of the employee and his family against adversity resulting from illness or death is as important as his protection through workmen's compensation laws against injury incurred while on the job. These benefits are part of an employee's wage picture and part of an employer's cost. Because of the added cost to employers in agreeing to such plans, benefits under welfare plans have become a major issue in collective bargaining. See *Final Report, Senate Committee on Labor and Public Welfare, Welfare and Pension Plans Investigation*, supra. They are part and parcel of the employment relationship and constitute an important facet of our industrial society.

The welfare fund contributions in the instant case were established by collective bargaining agreement, along with other fringe benefits, such as vacation pay, severance pay, holiday pay, etc. In fact, the contributions here are a direct substitute for sick leave pay for which the contract formerly provided. This fringe benefit is no different from those which the courts have consistently held are entitled to priority as "wages . . . due to workmen."

The view of the court below is perfectly consistent with the ever expanding definition of the term "wages." Congress has impliedly approved this expansion in numerous other enactments and by reason of its failure to place any limitation upon the liberal interpretation which courts have given to this word in the Bankruptcy Act. Indeed, the interpretation we support here is in accord with the Con-

gressional purpose of protecting the wage earner against adversity at the time of loss of employment.

Welfare fund contributions are an integral part of an employee's wage picture. The employer's obligation to pay them does not arise from a debtor-creditor relationship, but from the collectively bargained wage structure. These amounts are as much "due to" employees as the wages paid to them in cash. *United States v. Carter*, 353 U. S. 210 (1957).

The courts which have been faced with the problem presented in the instant case have divided almost equally in their answer to the question posed. In *In re Otto*, 146 F. Supp. 786 (S. D. Cal. 1956), *In re Schmidt*, 33 Labor Relations Reference Manual 2283 (S. D. Cal. 1953), and *In re Embassy Restaurant, Inc.*, 154 F. Supp. 141 (E. D. Pa. 1957) *aff'd* 254 F. 2d 475 (3rd Cir. 1958), the courts have held that welfare fund contributions owed by an employer are part of the compensation due employees and entitled to preference under Section 64 (a) (2) of the Bankruptcy Act as "wages . . . due to workmen." In *In re Matter of Sleep Products, Inc.*, 141 F. Supp. 463 (S. D. N. Y. 1956), *aff'd sub nom. Local 140 Security Fund v. Hack*, 242 F. 2d 375 (2d Cir. 1957), *cert. den.* 355 U. S. 833, *In re Brassel*, 135 F. Supp. 827 (N. D. N. Y. 1955) and *In re Victory Apparel Mfg. Corp.*, 154 F. Supp. 819 (D. N. J. 1957) (now pending on appeal to the Third Circuit), the courts have held that welfare fund contributions were not "wages" within the meaning of the priority section of the Bankruptcy Act.

The approach which courts should take to problems involving welfare funds was well stated by Judge Goodrich, in *Local 333 v. Essex Transportation Co.*, 216 F. 2d 410, 411 (3rd Cir. 1954): "We approach the question with the thought in mind that these welfare funds represent a social device to be encouraged." Further, as Judge Goodrich observed at page 413, welfare funds have "met with legislative sanction, judicial approval and represent a growing trend in employer-employee relations."

That Judge Goodrich accurately read the temper of present day attitudes is evidenced by the most recent Congressional finding on this subject. Section 2(a) of the Welfare and Pension Plans Disclosure Act, Public Law 85-836, 72 Stat. 997 (approved Aug. 28, 1958) provides in part as follows:

> "Sec. 2(a)—The Congress finds that the growth in size, scope, and numbers of employee welfare and pension benefit plans in recent years has been rapid and substantial; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations. . . ."

Accordingly, where a construction of law favoring welfare funds is permissible under the language being interpreted, it should be adopted. Here the word "wages" certainly may be interpreted to include payments for welfare fund benefits. This construction should be adopted because it is the policy of the law to encourage this form of protection accorded employees and their families.

ARGUMENT

I. Welfare Fund Contributions Are "Wages" Within the Meaning of Section 64(a)(2) of the Bankruptcy Act.

It is interesting to note at first the advancement in the status of wage claims in the successive Bankruptcy Acts. Wage claims under the Chandler Act, Act of June 22, 1938, 52 Stat. 840, 11 U. S. C. 104(a), have been advanced to the highest priority they have ever held.

In the original Act of August 19, 1841, 5 Stat. 440, three classes of priority were established, the third of which was wages. Wage claims were granted fourth standing out of five priority groups in the Act of March 2, 1867, 14 Stat. 517. Section 64 of the Bankruptcy Act, Act of July 1, 1898, 30 Stat. 544, established two classes of priorities, the first being taxes and the second being all others including wages. Section 64(a) of the Chandler Act, the present Bankruptcy Act, improved the status of the wage priority by granting it second standing ahead of a fourth priority for federal and local taxes.

This legislative intent expressed in the present Section 64(a)(2), to favor the wage earner in obtaining his just due from the bankrupt's estate by elevating the wage earner's claim over all priority claims except the actual costs of preserving the bankrupt's estate, has been recognized by this Court. This Court has displayed its awareness of the Congressional purpose of advancing the wage priority even at the expense of the governmental tax claims. In *Guarantee Title and Trust Co. v. Title Guaranty and Surety Co.*, 224 U. S. 152 (1912), this Court said:

> "The policy which dictated it (Bankruptcy Act) was beneficent and well might induce a postponement of the claims, even of the sovereign in favor of those who necessarily depended upon their daily labor" 224 U. S. at page 160.

The legislative elevation of the wage priority has been consistent with the expanding judicial definition and use of the term "wages" in the Bankruptcy Act and the parallel expansion and development of our industrial society. Congress has never changed, amended or in any way limited the use of the word.

The term "wages" in the successive bankruptcy statutes has never been expressly defined by Congress. The courts have concluded that no technical definition of the word has been included in the Act because it is a plain, simple word meaning "the agreed compensation for services rendered." *In re Gurewitz*, 121 Fed. 982, 983 (2d Cir. 1903). The term has generally been construed "in its broader and more general sense" to attain this meaning. *In re Dexter*, 158 Fed. 788 (1st Cir. 1907); *In re Otto*, 146 F. Supp. 786 (S. D. Cal. 1956).

The term "wages" has been generally defined as "the compensation paid by an employer for services rendered to him by others." *Glandzis et al. v. Callinicos*, 140 F. 2d 111 (2d Cir. 1944). It arises directly from the employer-employee relationship. But, as we shall point out, "wages" has always been construed to mean more than just the hourly, daily or weekly rate of pay for labor performed. It has been expanded to cover all types of compensation received for services rendered.[3]

This broad approach to the term "wages" has been in accordance with the liberal interpretation which courts have customarily given the term:

> "It is well-settled that provisions of the Bankruptcy Act giving priority to claims for wages due employees are to be liberally construed." *Manly v. Hood*, 37 F. 2d 212, 214 (4th Cir. 1930).[4]

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[3] See Note, 19 Georgia Bar Journal 107 (1956).

[4] The Government's argument that priorities in bankruptcy should be strictly construed has never been applied to the definition of the term "wages". Although courts have sometimes strictly construed the definition of "workmen, servants, (and) clerks", these

The wage priority is generally understood to be remedial in nature and courts have not looked kindly upon any limitation of its scope. *In re Caldwell*, 164 F. 515 (E. D. Ark. 1908); *In re Roebuck Weather Strip and Wire Screen Co.*, 180 F. 497, 498 (S. D. N. Y. 1910); *In re Rodgers and Garrett Timber Co.*, 22 F. 2d 571 (D. Md. 1927). The complete absence of any restrictive interpretations of the term "wages" in the century since the priority was first granted is indeed noteworthy.[5]

The meaning of the term "wages" in Section 64(a)(2) has steadily expanded as new methods of computing "compensation for services rendered" have come into use in commerce and industry. *In re Otto*, supra. Today, "wages" are held to include vacation pay: *In re Public Ledger, Inc.*, 161 F. 2d 762, 767 (3d Cir. 1947), *Division of Enforcement v. Sampsell*, 172 F. 2d 400 (9th Cir. 1949), *In re Wil-low Cafeterias, Inc.*, 111 F. 2d 429 (2d Cir. 1940), *In re Kinney Aluminum Co.*, 78 F. Supp. 565 (S. D. Cal. 1948); severance pay: *McCloskey v. Division of Enforcement*, 200 F. 2d 402 (9th Cir. 1952); disability insurance premiums deducted by an employer and paid to an insurance company: *In re Ross*, 117 F. Supp. 346 (N. D. Cal. 1953); back pay: *National Labor Relations Board v. Killoren*, 122 F. 2d 609 (8th Cir. 1941), *cert. den.* 314 U. S. 696.

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decisions may be attributed to judicial unwillingness to expand the class of employees entitled to priority lest the more needy wage earner's recovery be diluted. See *In re Paradise Catering Corp.*, 36 F. Supp. 974 (S.D.N.Y. 1941); *In re Estey*, 6 F. Supp. 570 (S.D.N.Y. 1934), both of which were relied upon by the court *In the Matter of Sleep Products, Inc.*, 141 F. Supp. 463 (S.D.N.Y. 1956) aff'd sub nom. *Local 140 Securtiy Fund v. Hack*, 242 F. 2d 375 (2d Cir. 1957), cert. den. 355 U.S. 833.

[5] Only in answering the issue presented here have some courts attempted to retrench from the steadily expanding definition of the term "wages". *In re Brassel*, 135 F. Supp. 827 (N.D.N.Y. 1955); *In the Matter of Sleep Products, Inc.*, 141 F. Supp. 463 (S.D.N.Y. 1956) *aff'd sub nom; Local 140 Securtiy Fund v. Hack*, 242 F. 2d 375 (2d Cir. 1957) *cert. den.*, 355 U.S. 833; *In re Victory Apparel Mfg. Corp.*, 154 F. Supp. 819 (D.N.J. 1957).

Thus, in *Otto, supra*, the court concluded that "an employer's contributions to a welfare fund for the benefit of employees and others, payable in performance of an obligation of the employer under a collective bargaining agreement, and measured on the basis of a certain amount per hour worked by employees, is but another method of computing and paying compensation for services rendered, and accordingly should be held to be 'wages' within the meaning of Section 64 (a) (2) of the Bankruptcy Act." Cf. *McKee v. Paradise*, 299 U. S. 119 (1936).

The restrictive and technical view urged by the Government in this case disregards the steady expansion of the term "wages." Certainly when Congress originally used the term in the Bankruptcy Act of 1841, it did not have within its contemplation items such as vacation pay, severance pay, welfare fund contributions, or the many other fringe benefits which today constitute compensation for services rendered. The Government's argument that Congress never intended to include welfare fund contributions within the priority applies equally to vacation pay, severance pay and other fringe benefits which are accepted today without question as falling within the wage priority. To limit the definition of wages to its nineteenth century content would be to neglect totally a century of liberal intrepretation of the term and the continuing judicial expansion of its definition to meet modern economic conditions.

An examination of other contexts in which Congress has used the word "wages" may be helpful. The Government points out that welfare fund contributions are not treated as wages under the Revenue Act of 1954, 26 U. S. C. 106; the Federal Insurance Contributions Act, 26 U. S. C. 3121(a)(2); the Federal Unemployment Tax Act, 26 U. S. C. 3306(b)(2); and the Social Security Act, 42 U. S. C. 409(b). What the Government neglects to point out is that in each case the exclusion is by virtue of a specific legislative exception.

To use the words of Chief Justice Marshall it is a well-established

> ". . . rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the law-giver, the thing excepted would be within the general clause, had the exception not been made." *Brown v. Maryland*, 25 U. S. (12 Wheaton) 419, 438 (1827).

It was necessary specifically to except these contributions from the definition of "wages" in these statutes, because they would have been within the general definition had the exception not been made. *In re Otto*, supra.[6] And in the absence of specific exceptions, welfare fund contributions have been held to constitute wages within the meaning of the Social Security Act, *MacPherson v. Ewing*, 107 F. Supp. 666 (N. D. Cal. 1952) and the Federal Employment Tax Act, *The City of Avalon*, 156 F. 2d 500 (9th Cir. 1946).[7]

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[6] In a Note in 66 Yale Law Journal, 449, 459, the author prefers the view that it is doubtful if Congress has a single notion of "wages" applicable to each statute in which the term appears. He suggests that the use of other statutes in interpreting the term is of doubtful value if the policy considerations are not the same. We shall point out hereinafter that under a statute with a purpose similar to the Bankruptcy Act, this Court has adopted an interpretation similar to that of court below. *U. S. v. Carter*, 353 U. S. 21 (1957).

[7] The government's citation of the English statute is of no aid here because the statute relied upon is not a bankruptcy statute, but concerns insurance and medical care under a totally different social system. The amendment to Section 22 of the New York Debtor and Creditor Law, McKinney's Consolidated Laws c. 12, relied upon by the government, may have had as its purpose only the effectuation of the original legislative intent. In the absence of legislative history, we do not know whether the New York legislature may have amended its law only to reverse judicial misunderstanding of its original purpose.

The same may also be said as to H.R. 8805, 85th Congress, 1st Session, relied upon by the Government. Congress did not consider the bill, and we do not know whether the sponsor may only have been concerned with reversing the decisional trend of the New York cases, such as *Brassel* and *Hack*. In any case, the statement in the Government's brief that the bill would not cover the welfare fund

Moreover, the exception of welfare fund contributions from the definition of "wages" in the cited statutes only serves to emphasize the favor with which Congress regards such contributions. The Revenue Act, the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Social Security Act are all taxing statutes and, in the absence of the exception, welfare fund contributions would be regarded as taxable to the employee and used in computing the applicable deductions under those statutes. Congress obviously intended to confer upon these contributions a tax benefit rather than to have the amount of the contribution paid to the employee, taxed to him, and then assigned to the welfare fund or the insurance company.

The National Labor Relations Board, admittedly an expert body in the field of industrial relations, has interpreted the word "wages" in Section 9 of the National Labor Relations Act, 29 U.S.C.A. 159, as including welfare fund contributions. In *Inland Steel Co. v. National Labor Relations Board*, 170 F. 2d 247, 251 (7th Cir. 1948), *cert. den.* 336 U.S. 960, the court said:

> "We are convinced and find that the term 'wages' . . . must be construed to include emoluments of value, like pension and insurance benefits, which accrue to employees out of their employment relationship. Realistically viewed, this type of wage enhancement or increase no less than others, becomes an integral part of the entire wage structure and the character of the employee representatives' interest in it, and the terms of its grant, is no different than in any other case where a change in the wage structure is affected . . .
>
> "It surely cannot be seriously disputed that such a pledge on the part of the Company forms a part of the

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contributions involved here fails to consider that the contributions here are made per month for each employee member of the Union in the employ of the particular employer (R. 29, 30). The contributions are thus based upon employment status which encompasses "hours worked or wages paid."

consideration for work performed . . . In this view, a pension thus promised would appear to be as much a part of 'wages' as the money paid him at the time of the rendition of his services . . . Such obligation (payments not made as a result of a promise contained in a plan or program) would represent a part of the consideration for services performed and payments made in discharge of such obligation would in our view be 'wages'."

See also *National Labor Relations Board v. Black-Clawson Co.*, 210 F. 2d 523 (6th Cir. 1954); *W. W. Cross & Co. v. National Labor Relations Board*, 174 F. 2d 875 (1st Cir. 1949).

These cases merely provide judicial recognition of the fact that in present day industrial relations fringe benefits in the form of medical services, hospital services, pension plans and the like are as much desired by employees as direct wage increases. In fact, in speaking of all the benefits conferred by a collective bargaining agreement, both management and labor speak of the "package" which contains both direct wages payments and indirect wage payments in the form of fringe benefits. And employees think of the employer's total contribution as the equivalent of wages paid in ready cash. They have merely assigned a portion of their total wage payments to buy these additional benefits not received immediately in cash. Whether or not the employees have formally assigned this portion of their total wage to the welfare fund in strict compliance with the vagaries of local law may create a technical legal problem, but it is one which is of no significance in the administration of the Bankruptcy Act. *Cf. Shropshire, Woodliff & Co. v. Bush*, 204 U.S. 186 (1907).

Perhaps an example may serve to illustrate this point. Suppose an employer and a union negotiate a five cents per hour increase across the board in rates of employees' pay. Clearly this additional nickel would be "wages" en-

titled to priority under Section 64(a)(2) of the Bankruptcy Act. Now, suppose the employees instead instruct their union to negotiate an increase in benefits provided under their welfare plan which would cost their employer an additional five cents per hour. The wage cost to the employer is the same in each case. And certainly it makes no difference to the employer whether this nickel an hour increase is paid directly to the employees or to the welfare fund. In either case, it represents an additional wage cost of five cents. But the Government would want this same nickel to be treated differently in the latter case by being denied the priority granted in the former.

We submit that this different legal treatment of the same five cents an hour cannot be justified in fact or in theory. Whatever its ultimate destination, this nickel is a part of the total wage picture and is being paid by the employer to his employees as part of their compensation for services rendered. In either case, it is accordingly "wages" within the meaning of the Bankruptcy Act.

The Court below thoroughly understood this principle and the realities of our modern day industrial society. The court very clearly stated:

> "Union Funds providing welfare benefits to employees through employer contributions contracted for in collective bargaining agreements play an essential and ever growing part in our industrial economy. We are firmly convinced that unions bargain for these contributions as though they were wages, and further that industry considers the contributions as an integral part of the wage package. See Note, 66 Yale L.J. 449, 460 (1957). The contributions are in a true sense the agreed compensation for services rendered and as such must be considered wages." (R. 45).

The reasoning is strengthened by further analogy. If the five cents per hour referred to above is paid to employees and taxable to them, but assigned by them to an

insurance company to pay premiums for benefits, the insurance company's claim is entitled to the wage priority. *In re Ross*, 117 F. Supp. 346 (N.D. Cal. 1953). Yet if the same five cents is paid to a welfare fund, which itself buys the insurance, thus affording a permissible tax benefit to employees, the Government contends that the wage priority is not applicable. To deny priority claims on the basis of such a technicality is completely illogical.

The Government attempts to differentiate between compensation to be used for different purposes. This is not the function of a bankruptcy court. *In re Schenectady Railway*, 93 F. Supp. 67, 70 (N. D. N. Y. 1950). The fact that employees use a portion of their compensation to purchase welfare benefits through their welfare fund is not relevant and should not be considered by a bankruptcy court.[8] The welfare fund contributions are part of their earnings for labor performed and "it surely could not have been the purpose of Congress to make the method of computation a criterion of priority." *In re Gurewitz*, 121 Fed. 982, 983 (2d Cir. 1903).

It is important to note that the welfare fund contributions in this case were originally a substitute for sick leave pay formerly enjoyed by employees.[9] The employees, through their collective bargaining agent, gave up paid sick leave in return for this employer contribuiton to the welfare fund and their coverage thereunder (R. 7, 8, 29). We do not believe that the Government would seriously contend that an employee entitled to such sick leave pay due within the three months prior to bankruptcy would not be entitled to priority. Sick leave pay is certainly comparable to severance pay, representing pay for a period of forced absence from work. Cf. *McCloskey v. Division of Enforcement*, 200 F. 2d 402 (9th Cir. 1952). Employees

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[8] See Comment, 44 Virginia Law Review 995 (1958).

[9] The Government's attempt to distinguish the *Otto* and *Ross* cases (Government brief, pp. 27, 28) apparently fails to consider this most important factor.

here gave up sick leave pay for its equivalent, welfare fund contributions. Despite what should be the bankruptcy court's lack of concern with how the wage earner spends his compensation, the Government seeks here to distinguish between collective bargaining equivalents. The Government would not deny that sick leave pay is entitled to priority; yet, it argues that the same compensation in the form of welfare fund contributions is not. The Government's position that contributions to a welfare fund, the purpose of which is to provide sick benefits, are not "wages" within the meaning of the Bankruptcy Act does not withstand logical analysis.

One of the admitted purposes of the wage priority is to provide a protective cushion to employees against the shock occasioned by the loss of employment.[10] This purpose is well served by granting the priority to these contributions. Since eligibility to benefits under a welfare plan may depend upon hours of employment for which contributions are made, an employee's entitlement to benefits may very well depend upon whether these contributions are granted priority and thus paid to the welfare fund. See *U. S. v. Carter*, supra, at p. 214. For example, if an employee's eligibility for welfare benefits is dependent upon the fund's *receipt* of contributions covering a certain number of hours worked by him per month, an employee may lose his eligibility if the fund has not *received* the bankrupt's contributions because of a lack of priority. If priority is granted, the employee will then be assured of protection against the illness of himself or his family at a time when he is least able to protect himself.[11]

The argument that the employee's entitlement to benefits is contingent upon adversity and therefore speculative

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[10] Since the inception of unemployment compensation in all states, the wage priority's original function has been largely preempted. Yet Congress has failed to amend Section 64(a)(2) so as to decrease the breadth of the wage priority.

[11] See 19 Georgia Bar Journal 107.

is, of course, applicable to any situation where insurance principles are involved. This does not lessen the force of the protection given to the wage earner against illness, hospitalization, etc., after bankruptcy, when he is in the worst possible position to afford it. Thus, in line with our modern wage structure, granting a priority to welfare fund contributions fulfills the legislative purpose of protecting the wage earner against but another aspect of the loss of employment, the loss of protection against illness, hospitalization and inability to work.[12]

II. Welfare Fund Contributions Are "Due to" Employees Within the Meaning of Section 64(a)(2) of the Bankruptcy Act.

In the preceding section we have established that welfare fund contributions are "wages" within the meaning of Section 64(a)(2) of the Bankruptcy Act. It remains but to be shown that these contributions are "due to workmen" within the language of that section.

There is nothing unusual in the fact that a claim is made on behalf of a workman by another. The wage priority of Section 64(a)(2) has long survived an assignment by an employee even though the "wages" are then "due to" the assignee regardless of his status and the wage earner's priority benefits the assignee. *In re Stutz*, 226 F. 989 (S. D. N. Y. 1915). The character of the debt is fixed when it is

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[12] Congressional recognition that welfare and pension plans serve this end is illustrated by the Subcommittee Report of the Senate Committee on Labor and Public Welfare, 84th Congress, 2d Session, Senate Report No. 1734, page 2, where it is said:

> "They (welfare and pension programs) constitute an important underpinning of our economic security, broadening and supplementing the various governmental programs. They provide continued income for the sick wage earner, cover hospitalization and surgical costs, maintain purchasing power when the years of active earning are ended, and furnish security to dependents after the worker's death . . ."

incurred. A subsequent assignment, whether to an insurer, to a welfare fund, or anyone else, does not alter the nature of the claim. As this Court said in *Shropshire, Woodliff and Co. v. Bush*, 204 U. S. 186 (1907):

> "The priority is attached to the debt, and not to the person of the creditor; to the claim and not to the claimant."

Moreover, the entire phrase, "due to workmen" may more reasonably be construed as limiting only the types of employees whose wages are entitled to the priority. Had the draftsman intended to give the phrase "due to" any independent meaning to limit the type of wages eligible for the priority, he would have repeated the syntax used in the preceeding limitation ("wages . . . which have been earned") Thus, the clause to have the meaning ascribed by some that wages must be "due to" the employee would read: "wages which have been earned . . . and which are due to workmen . . ." Accordingly, the phrase "due to" is used in Section 64(a)(2) as if it meant "owing." See *Kavanas v. Mead*, 171 F. 2d 195, 198 (4th Cir. 1948); See Note, 66 Yale Law Journal 449, 453.[13]

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[13] We do not believe that it is necessary to consider the question of whether the collective bargaining agreement creates any legally enforceable rights in an employee so as to permit him to sue his employer directly for the unpaid contribution. If he possessed such right, the contributions would certainly be "due to" the employee even within the meaning of the Government's restrictive interpretation. The employee may be the beneficiary of fiduciary obligations owed him by the trustees; he may be the third party beneficiary of the collective bargaining agreement. *2 Restatement of Trusts*, Sec. 282(2); *In re Norwalk Tire and Rubber Co.*, 100 F. Supp. 706 (D.C. Conn. 1951). There is some question as to who can enforce the employer's obligation to make these payments. Cf. *I.L.G.W.U. v. Jay-Ann Co.*, 228 F. 2d 632 (5th Cir. 1956) with Local 333, *United Marine Division v. Essex Transportation Co.*, 216 F. 2d 410 (3rd Cir. 1954). For a discussion of this subject, see 66 Yale Law Journal, 449, 455, 455. Cf. also Section 302 of the Labor Management Relations Act of 1947 and particularly Section 302(e), 29 U.S.C.A. 186.

In any case, we should have thought that this question was settled by this Court's decision in *United States v. Carter*, 353 U. S. 210 (1957). In that case suit was brought by the trustees of a welfare fund established by collective bargaining agreement, and similar to the fund in the instant case, against a surety company on the employer's bond. The Miller Act, 49 Stat. 793, 40 U. S. C. 270a et seq., requires contractors to furnish the United States with a payment bond on any government construction work and grants to persons who provide labor or material on the job the right to sue for "sums justly due him." The lower courts had ruled that the trustees of the welfare fund in that case had neither furnished labor nor were they seeking funds justly due them as required to recover under the statute. This Court reversed and held that welfare fund contributions were compensation justly due them to employees who performed labor on the job and that the trustees of the welfare fund had the right to sue to recover such contribution.

In dicussing the jural realtionship created by the welfare fund, this Court stated:

> "Whether the trustees of the fund are, in a technical sense, assignees of the employee's rights to the contributions need not be decided. Suffice it to say that the trustees' relationship to the employees, as established by the master labor agreements and the trust agreement, is closely analogous to that of an assignment. The master labor agreements not only created Carter's obligation to make the specified contributions but simultaneously created the right of the trustees to collect those contributions on behalf of the employees. The trust agreement gave the trustees exclusive rights to enforce payment. *The trustees stand in the shoes of the employees and are entitled to enforce their rights.*
>
> "Moreover, the trustees of the fund have an even better right to sue on the bond than does the usual as-

signee since they are not seeking to recover on their own account. The trustees are claiming recovery for the sole benefit of the beneficiaries of the fund, and those beneficiaries are the very ones who have performed the labor. The contributions are the means by which the fund is maintained for the benefit of the employees and of other construction workers. For purposes of the Miller Act, *these contributions are in substance as much 'justly due' to the employees who have earned them as are the wages payable directly to them in cash.*" (Italics supplied.)

The instant case presents exactly the same situation. The bankrupt's obligation to make the welfare fund contributions arises from the collective bargaining agreement (R. 6, 7, 8, 29, 30). The trust agreement empowers the trustees to collect the amounts due (R. 13, 21). The contributions are, as this Court stated, as much "due to workmen", as are the wages paid directly to them. If the contributions are "justly due" to persons who furnish labor under the Miller Act, they are "due to workmen," as compensation for their services, within the meaning of the Bankruptcy Act.

The Government's attempt to distinguish the *Carter* case does not comprehend the import of this Court's analysis. An employer's collectively bargained obligation to contribute to a welfare fund does not create a debtor-creditor relationship any more than his obligation to pay wages, vacation pay or other forms of compensation. The only difference between vacation pay and the welfare fund contributions involved here is that the contributions are received by the trustees who "stand in the shoes of the employees." The contributions to the welfare fund result directly from the labor of employees just as do their wages, vacation pay, etc. The contributions are, therefore, "due to" employees who have permitted and authorized the welfare fund trustees to "stand in their shoes" in the attempted recovery of such contributions.

III. The Decision of the Court Below Is in Accord with the Realities of Economic Life and Should Be Affirmed.

We believe that logic and reason support the decision of the court below. The court's opinion (R. 42-47) represents a sanguine and intelligent approach, illustrative of the liberal construction courts have always given the claims of wage earners. It is the antithesis of the unduly strict, limited and technical approach the Government has adopted before this Court. As we have previously stated, the precise question presented here was before the Second Circuit in *Local 140 Security Fund v. Hack*, supra, and before several district courts. The *Hack* case and the others present an unduly restrictive and technical interpretation of the Bankruptcy Act. They represent a point of view which does not conform to the realities of our industrial life.

It is interesting to observe that the *Hack* case cites with approval *In re Ross*, 117 F. Supp. 346 (N.D., Cal. 1953). The court states that where employees have assigned a portion of their wages to the welfare fund, "there is a sound basis for a claim of priority by the assignee in such a case," citing *Shropshire Woodliff and Co. v. Bush*, supra. In the *Ross* case, the bankrupt employer had obtained an insurance policy from the claimant insurance company on behalf of his employees deducting from their wages the premiums due. The opinion of the court indicates that no formal assignment of this portion of the wages of the employees was ever made by them to the claimant. In fact, the bankrupt contended that the employees did not have control over this portion of their wages sufficient to make an assignment that would carry with it their wage claim priority. The court rejected this argument commenting that under California law an employee may make an effective assignment of wages earned under an existing employment contract. The court pointed out that if the employer had not agreed to pay the insurance premiums

for the benefit of his employees, they would have had complete freedom of disposition of this portion of their wages which instead went to the insurance company. Since the debt of the bankrupt was incurred for services which the employees rendered and not for insurance benefits, it represented "wages" within the meaning of the Bankruptcy Act.

Thus, the Court of Appeals for the Second Circuit would have declared the payments to the welfare fund to be entitled to priority if employees had assigned this portion of their wages to the fund as was the case in *Ross*, but in the absence of formal assignment by the employees, the contributions were held not entitled to priority. We have already argued that it makes absolutely no sense to treat the same amount in two different ways for purposes of bankruptcy priority, depending upon whether it is paid to employees, taxed to them and then assigned to the welfare fund, or whether it is paid directly by the employer to the welfare fund or insurance company. The Second Circuit's approval of the *Ross* case, however, demonstrates its unnecessary reliance upon the absence of a formal wage assignment in the *Hack* case.

It is possible to distinguish the New York and New Jersey cases on the ground that the courts in those cases believed that wages were not assignable under the laws of those particular states. In *In re Victory Apparel Manufacturing Corp.*, 154 F. Supp. 819 (D. N.J., 1957), the court was careful to point out that the law of New Jersey did not enforce assignments of wages. The law of Pennsylvania, which governs this welfare fund (R. 24), like that of California, permits wage assignments. *Bush v. Eastern Uniform Co.*, 356 Pa. 298 (1947). And to constitute a valid assignment no particular formality is necessary. Any act, conduct or words are sufficient which show an intention to transfer or appropriate a right to the assignee for a consideration. *Moeser v. Schneider*, 158 Pa. 412 (1893); *McCleary v. Stoup*, 32 Pa. Super 42 (1906). It may well be that the real distinction between *Otto* and

the instant case and *Hack* is that in California and Pennsylvania informal wage assignments are permitted and in New York the court, as far as can be determined from its opinion, apparently believed that they were not permitted, being regulated by statute which required the strict observance of certain forms, formalities and filings to be valid.[14]

In pointing out this distinction, however, we do not wish to appear as if we approve it. We do not: We submit, on the contrary, that the broad social policy explicit and implicit in giving a preferential status to "wages" should cover employer contributions to employee welfare funds in New York and New Jersey as well as in California and Pennsylvania, and vagaries of local laws as to wage assignments should not produce different results. Uniformity of treatment is desirable since many welfare plans cover employees in several states and the same employer contributions to each should be treated alike in applying Section 64(a)(2) of the Bankruptcy Act. Cf. *Textile Workers Union of America v. Lincoln Mills of Alabama*, 355 U. S. 448 (1957).[15]

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[14] While it is generally true that wage assignments in New York are strictly regulated by statute, the statute specifically exempts from its coverage deductions from wages for welfare benefits. In its definitions section the statute states:

> "Assignments shall not include . . . such sums as may be deducted by the employer for payment to . . . a trust fund for the benefit of employees, pursuant to agreement in writing . . . with a labor organization of which the employee is a member."

40 McKinney's Consolidated Laws of New York, Sec. 46(1), p. 121, 1957, Cumulative Annual Pocket Part, Laws of New York, Chapter 828, Section 2, effective September 1, 1950. So far as its opinion reveals, the court in *Hack* was unaware of this provision which we believe warrants a different result than that reached by the court. Certainly, this provision of New York law, if known to the court, would have been worthy of comment.

[15] The fear of the court in *Hack* about different methods of contributing to welfare funds resulting in different judicial opinions is without merit. Since such contributions are part of the collectively bargained wage picture, uniformity in the method of computation is unimportant.

The *Otto* case, 146 F. Supp. 786 (S. D. Cal., 1956) is on all fours with the instant case. The Government's attempt to distinguish it on the ground that the welfare fund contributions there came from setting aside a portion of wage increases fails because the contributions in the instant case resulted from the employees' giving up the paid sick leave which they previously enjoyed in return for welfare fund contributions and coverage (R. 6, 7, 8, 29, 30).

The Government's argument in this case fails to comprehend the basic realities of our economic life. The court below recognized that welfare fund contributions are bargained for by unions. They are part of the over-all wage package which results from collective bargaining. Trustees of welfare funds do not negotiate separate contracts with employers after wage negotiations are completed and thus establish a separate debtor-creditor relationship distinct and apart from the wage settlement arrived at through collective bargaining. The employer does not undertake two obligations, one to employees and one to the welfare fund. The welfare fund contributions emanate from the collective bargaining relationship and are an integral part of the wage settlement. They represent the compensation to be paid to employees for the term of the collective bargaining agreement.

The concern of the New York cases and of the Government with a judicial expansion of the definition of "wages" is unfounded. The Court of Appeals for the Third Circuit has not mislabeled such welfare fund contributions. It has merely adapted the term "wages" to modern industrial life and applied a twentieth, rather than a nineteenth century approach in the use of the term in Section 64(a)(2) of the Bankruptcy Act.

The approach of the court below is consistent with the expanded judicial construction of "wages" as used in the Bankruptcy Act. There is no doubt that when Congress first used the term in 1841 it did not have within its contemplation the host of fringe benefits which are today an integral part of the employment relationship. The courts

have consistently held these items to be "wages" and entitled to priority. Yet Congress has refrained from amending the term "wages" in any way for over one hundred years.[16]

This Court's rationale in *United States v. Carter*, supra, lends solid support to the view of the court below. This Court recognized that welfare fund contributions represented compensation to employees. In the negotiation of the collective bargaining agreement with the employer, the union, as the collective bargaining agent of the employees, has agreed that a certain amount of the wage package proposed by the employer be paid to the welfare fund for the benefits employees would obtain thereunder. The employees, acting through their collective bargaining representative, have agreed that a portion of their wage

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[16] Congressional recognition of the status of welfare fund contributions is illustrated by Senate Report No. 1440 of the Senate Committee on Labor and Public Welfare, 85th Congress, 2d Session, dated April 21, 1958, which states in part as follows:

> "Regardless of the form they take, the employers' share of the cost of these plans (employee welfare and pension plans) or the benefits the employers provide are a form of compensation."

And in discussing the characteristics of collectively bargained plans, the Report states:

> "Generally speaking, in collectively bargained plans representatives of labor bargain with management for the benefits to be provided on a cost basis as part of the compensation of the employees."

The Final Report of the Committee on Labor and Public Welfare, 84th Congress, 2nd Session, Senate Report No. 1734, states at page 304:

> "There was general agreement that whether or not the program is jointly or unilaterally administered, whether negotiations are in terms of benefits, cents per hour, or percentage of payroll, the cost of providing the benefits is basically something that belongs to the worker and the worker is entitled to the most benefits for the money involved. The employer has agreed at the bargaining table that contributions to provide certain benefits are due the worker in return for his endeavors."

increases shall be so channeled. Cf. *J. I. Case v. National Labor Relations Board*, 321 U. S. 332 (1944).

This Court, in *Carter*, expressed its awareness of this process when it stated that the "trustees relationship to the employees . . . is closely analogous to that of an assignment." The employees have, through their collective bargaining representative, diverted a portion of their wage increases to the welfare fund. It is unimportant whether this is technically an assignment under the laws of Pennsylvania, New York or California. Agreements between an employer and a union obligating the employer to contribute to a welfare fund are *sui generis*, and the legalistic approach adopted by the Government is not applicable.

The Miller Act, which was before this Court in *Carter*, has the same basic purpose as Section 64(a)(2), the protection of the wage earner against the failure of the employer to pay compensation due for services rendered. Both enactments effectuate a legislative purpose to secure for the employee all sums owed by the employer for the labor he has performed. As the court below stated, there is no reason to treat such contributions one way under the Miller Act and another way under the Bankruptcy Act (R. 47). If they are "justly due" to employees under the Miller Act, they are certainly compensation for services rendered and "wages" within the meaning of Section 64(a)(2) of the Bankruptcy Act.

This Court has pointed the way to a realistic appraisal of the term "wages." No legislative enactment is necessary to characterize what is actual fact in modern industrial relations. The view of the court below is in accord with the realities of our present labor-management structure in which welfare fund contributions are recognized as compensation due to employees. It follows the judicially approved Congressional purpose of protecting the compensation of wage earners. It rejects the technical and legalistic

view in favor of a realistic and common sense approach.

VI. Conclusion

The judgment of the court below should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1958

No. 174

UNITED STATES OF AMERICA,
Petitioner,

vs.

EMBASSY RESTAURANT, INC., et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF NATIONAL ASSOCIATION OF CREDIT MANAGEMENT, INC., AS *AMICUS CURIAE*

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Interest of the Amicus Curiae

The amicus curiae, National Association of Credit Management, Inc. (formerly known as National Association of Credit Men), hereinafter referred to as the "Association", is a non-profit membership corporation consisting of approximately 35,000 manufacturers, bankers and jobbers throughout the United States all of whom are engaged in businesses involving the extension of unsecured credit to their customers.

The Association was organized in 1896 for the express purpose amongst others of urging the enactment

by Congress of a national bankruptcy act. Since the accomplishment of this purpose, one of its primary aims has been the improvement of bankruptcy law and procedure. The Association contributes financially to the support of the National Bankruptcy Conference, and its counsel has at all times taken an active part in the work of the Conference."

The Association's interest in the case at bar arises from the fact that the claims of its members in bankruptcy proceedings are usually unsecured general claims, which share last in the distribution of the assets, and any interpretation of the Bankruptcy Act which extends the class of persons entitled to priority necessarily diminishes the meager funds available for the payment of non-priority claims.

Statute Involved

Section 64 a of the Bankruptcy Act (11 U. S. C. Sec. 104 a), so far as here relevant, provides as follows:

> "a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (2) wages, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or travelling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; * * * (4) taxes legally due and owing by the bankrupt to the United States or any state or any subdivision thereof * * *."

Question Presented

Are payments due by an employer to the trustees of a union welfare fund pursuant to a collective bargaining agreement "wages * * * due to workmen" within the purview of Section 64 a (2) of the Bankruptcy Act, where there is no assignment of any part of their wages by the employees to the trustees of the fund, and where the trust agreement provides: (a) that the employer's contributions to the fund shall not constitute or be deemed moneys due the individual employees; (b) that said moneys shall not be liable for or subject to the debts, contracts, liabilities, or torts of the parties entitled to such money upon the termination of the plan; and (c) the trust fund is to be administered not only for the benefit of employees of the employer included in the collective bargaining unit, but also for the benefit of employees of the union.

Facts

We assume that the facts will be fully presented by the parties to this appeal, and we shall not repeat them except as necessary to the argument.

POINT I

Allowance of the claims of the trustees as priority "wage" claims does violence to the rule that rights of priority granted by the Bankruptcy Act should be strictly construed.

The lower courts are unanimous in holding that the priorities fixed by Section 64 of the Bankruptcy Act must be adhered to, and may not be varied or departed from, *In re Columbia Ribbon Co.*, 117 F. (2d) 999 (C. A. 3, 1941); claimants seeking priority must clearly establish their rights thereto, *In re Public Ledger*, 63 Fed. Supp. 1008, 1016 (1945); and such statutes must be strictly construed, *In re Wilt Dairy Co.*, 48 Fed. Supp. 964, 968 (1942); *In re Penticoff*, 36 Fed. Supp. 1 (1941); *In re Paradise Catering Corp.*, 36 Fed. Supp. 974 (1941); 3 *Collier on Bankruptcy* (14th Ed.) p. 2058.

The limited priority granted to wage claims by Section 64 of the Act was designed to protect those who are dependent upon their current earnings for their daily needs, and who, because of the employer's bankruptcy, might otherwise be in dire need of funds to satisfy the immediate requirements of themselves and their families. *Blessing* vs. *Blanchard*, 223 Fed. 35 (1915); and to reward and protect those who created assets for the bankrupt estate shortly before bankruptcy intervened. *In re Raiken*, 33 Fed. Supp. 88 (1940).

In *Matter of Brassel*, 135 Fed. Supp. 827 (1955), the court had before it a claim similar to that advanced in the instant case. In an exceptionally well-

reasoned opinion, which is based upon facts substantially the same as in the instant case, the court denied the claim of the trustees of the welfare fund to priority for the bankrupt employer's contributions to the fund. Holding that the term "wages" as used in Section 64 a (2) of the Bankruptcy Act does not include such contributions, the court said, at page 830:

> "If contributions to a fund by an employer are to be construed as 'wages' and as covered by the provisions of Section 64, sub. a (2) of the Act, its purpose of protection would be greatly weakened by present day conditions. A contribution of even a small percentage of the gross weekly payroll of a great number of employers would exceed the amount of $600 even in a single week.
>
> "The ultimate contention here however is one of priority. Liberality of construction of the term 'wages' does not justify a nullification of the language of the statute which grants priority only to 'wages * * * due to workmen'. The employers' contribution here is never due to the employee. He may not enforce the employers' liability therefor. The employee never had an individual or assignable proprietory interest in the contribution or to the fund of which the contribution became a part. The discretion of the trustees in the administration of the fund is final and conclusive. The contributions here may be entirely exhausted by the expense of administration or by benefits allotted to union members possessing union seniority who never have been employed by a contributing employer. Here there is no claim of an assignment by the employees. It was not the intention of the section to afford priority pro-

tection to entire strangers. The claim is not entitled to priority."

Commenting upon this decision, the *Chicago Kent Law Review* said (Vol. XXXIV, at page 238):

> "Even under the most liberal construction of all the terms of the relevant portions of the statute, the claimant was not a workman or an assignee of a workman; the sum claimed did not represent wages in the ordinary sense of the term, and the amount payable, while measured by the amount of wages earned, formed no more than a contractual obligation owed to a third person. No degree of liberality in connection with the construction of the terms of the statute could justify the amount of nullification in the language of the Act, much less justify the overruling of the long standing and incontrovertible decisions holding otherwise, which would be necessary before a claim of the kind asserted could be upheld. If the fringe benefits now common under modern mass employment contracts are to be protected against the impact of bankruptcy, substantial revision would have to be made both in the statutory language and in the fundamental principles concerning priorities."

As in the *Brassel* case, the employer's contributions to the welfare fund in the case here under review, while measured by the amount of wages paid to the employees, were not to be deducted from wages; were not assigned by the wage earners to the trustees; were not held in trust by the employer for the benefit of the wage earners; were never payable to the wage earners; were not subject to federal withholding or

income taxation; and were not considered wages under the Insurance Contributions Act (Social Security Law, 26 U. S. C. Sec. 3121 (a) (2)).

The Declaration of Trust (R. p. 22), provides:

> "The monies to be paid into the said Local 111, Welfare Plan shall not constitute or be deemed monies due to the individual employees, nor shall said monies in any manner be liable for or subject to the debts, contracts, liabilities or torts of the parties entitled to such money upon the termination of the Local 111, Welfare Fund."

In *Local 140 Security Fund* vs. *Hack*, 242 F. (2d) 375 (1957), the Court of Appeals for the Second Circuit had before it a similar claim. Holding that the employer's agreed contributions to the union welfare fund did not constitute wages within the meaning of the Act, the court said, at pp. 377, 378:

> "The claim in its origin must be one for wages due to a workman entitled to priority under Section 64, sub. a (2). If it is, the right of priority carried over to the workman's assignee. If the claim was never a part of his wages and was never a sum due to him, it would not be entitled to priority; and no theory of an indirect conditional benefit to him can give it priority. 'The priority is attached to the debt and not to the person of the creditor; to the claim and not to the claimant.'
>
> * * * *
>
> "What were specified in the collective bargaining agreement * * * as payments by the employer to Local 140 Security Fund * * * created only a

debtor and creditor obligation between the employer and third parties, for something other than wages. The language of the statute granting priority to wages cannot be stretched so as to embrace this type of claim. If every type of payment made by an employer to a union welfare fund is to be given priority as a claim for 'wages' * * * that should be done through the legislative action of the Congress, and not by any judicial mislabelling of such payments as 'wages'."

In the opinion in the instant case, the court below cited, in support of its decision, the decision of this court in *U. S.* vs. *Carter,* 353 U. S. 210. There the question was whether the trustees of a union welfare fund could maintain an action against the surety on a bond given by a contractor pursuant to the requirements of the Miller Act (40 U. S. C. Secs. 270 et seq.), which provides that Government contractors shall furnish a payment bond for the protection of "all persons supplying labor and material in the prosecution of the work."

This court held that the Miller Act is highly remedial and should be liberally construed to effectuate its protective purposes, and that the surety's liability on a bond issued under the statute must be at least coextensive with the obligations imposed by the Act if the bond is to have its intended effect. The court pointed out, however, that *"the Act * * * does not limit recovery on the statutory bond to 'wages'."* (p. 217). (Emphasis supplied.)

To effectuate the remedial purposes of the *Miller Act*, a liberal construction is necessary; but the reme-

dial purposes of the wage priority granted by the Bankruptcy Act are best served by a construction which does not extend the meaning of the word "wages" and which confines the limited right of priority to claims for wages in the usually accepted sense of the term.

The fact that the wage priority created by Section 64 a (2) limits the priority to each individual claimant to $600, makes it impractical to include claims such as those here at issue, for if such claims are classified as wages and granted priority, they will rank on a parity with the personal claims of individual wage earners, and the right of the individual wage earners to their $600 may be seriously impaired. It is difficult to believe that Congress ever contemplated such a situation.

Thus, if there were due to an employee $600 of wages, earned within three months before the date of bankruptcy, and the employer were in default in his payments to be made to the union welfare fund and measured by such employee's services, to the extent of $600 due within three months before bankruptcy, the $600 statutory priority would have to be apportioned between the employee and the trustees, thereby depriving the employee of all or part of the monies which he would otherwise have been entitled to receive.

If priority is to be granted to an employer's contributions to a union welfare fund, Congress, after a public hearing at which unsecured creditors, wage earners, the taxing authorities, and other affected parties would have an opportunity to be heard, should amend the Act to create a separate priority classification.

POINT II

The policy of Congress as expressed in recent legislation has been to limit priorities in order to protect the interests of general creditors.

Until the enactment of the Chandler Act on June 2, 1938, there was a tendency for the typical bankruptcy proceeding to resolve itself into a process in which one preferred party after another sliced off a portion of the available assets, with little or nothing remaining for distribution to general creditors. *In re Standard Composition Co.*, 23 Fed. Supp. 391, 395 (1938); *In re Pacific Oil and Meal Co.*, 24 Fed. Supp. 767, 771 (1938). Priorities created by state laws were recognized on a parity with priorities created by the laws of the United States, and the priority which might be allowed to a landlord's claim for rent was unlimited.

The Chandler Act repealed the provision recognizing state priorities, and limited the claims of landlords to rent legally due and owing on the date of bankruptcy and which accrued within three months prior thereto.

Currently, Congress is considering the enactment of a bill to reduce the priority of tax claims (now unlimited; Act Sec. 64 a (4)) to taxes which became legally due and owing within three years prior to the date of bankruptcy. Such a bill, drafted and supported by the National Bankruptcy Conference, passed the House of Representatives at the last session of Congress (H. R. 12802), and is expected to be reintroduced at the next session of Congress.

Shortly after the decision of the Court of Appeals for the Second Circuit in *Local 140 Security Fund* vs. *Hack, supra,* the Chairman of the Judiciary Committee of the House of Representatives introduced in the First Session of the 85th Congress a bill, known as H. R. 8805, which, in effect, would have reversed the holding of the *Hack* case. The bill was not enacted, and has not since been re-introduced. We may assume that Congress was satisfied with the legal status of this question as resolved by the *Hack* decision.

This court has held that "the theme of the Bankruptcy Act is 'equality of distribution', *Sampsell* vs. *Imperial Paper and Color Corp.,* 313 U. S. 215, 219; and if one claimant is to be preferred over others, the purpose should be clear from the statute." *Nathanson* vs. *Nat'l. Labor Relations Board,* 344 U. S. 26, 28-29 (1952).

Where, as here, a strained construction of the statute is necessary to sustain a claim of priority, it seems obvious that there cannot have been a clear intent to create the priority.

No social reason appears why the claim of the trustees of a welfare fund should be accorded a priority status as against the claims of unsecured creditors who have extended to the bankrupt the credit which enabled him to operate and pay wages, *especially where, as here, the fund is for the benefit of employees of the union, as well as employees of the bankrupt employer.* (Record p. 10; Agreement & Declaration of Trust, Article I, Section 3).

CONCLUSION

For the reasons above stated, we believe that the decision of the court below should be reversed.

Dated, New York, New York, November 28, 1958.

Respectfully submitted,

W. RANDOLPH MONTGOMERY,
Attorney for National Association of Credit Management, Inc., as amicus curiae

IN THE

Supreme Court of the United States

October Term, 1958

No. 174

UNITED STATES OF AMERICA,

Petitioner,

v.

EMBASSY RESTAURANT, INC., *et al.*

BRIEF FOR THE AMALGAMATED CLOTHING WORKERS OF AMERICA, ITS PHILADELPHIA JOINT BOARD, AND THE AMALGAMATED INSURANCE FUND, AS *AMICI CURIAE*

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Jurisdiction

The jurisdiction of this Court is conferred by 28 U. S. C. Section 1254(1) and Section 64 of the Bankruptcy Act, as amended.

The Amalgamated Clothing Workers of America (hereinafter called the "Amalgamated"), of which the Philadelphia Joint Board is an affiliate, represents approximately 400,000 workers in the United States and Canada. Nearly all of these workers are covered under employee welfare and pension plans, established pursuant to collective bargaining agreements. These plans, almost all of which are industry-wide in scope, are supported solely by employer contributions to the various funds. The largest of these funds, the Amalgamated Insurance Fund, (hereinafter referred to as the "Fund") covers approximately 125,000 employees for welfare and retirement benefits. This Fund is jointly administered by representatives of the contributing employers and the Amalgamated.

The Amalgamated and the Fund have matters involving the questions herein posed pending before referees in the Second and Third Circuits, among others. The Philadelphia Joint Board was granted leave by the Court of Appeals below to file a brief and appear *amicus curiae*. Another affiliate of the Amalgamated, Local 126, has a similar question pending on appeal before that court. *Matter of Victory Apparel Mfg. Corp.*, 154 F. Supp. 819 (D. N. J.).

For these reasons, consent to file and appear as *amici curiae* was obtained from the parties pursuant to Rule 42 of the Rules of this Court.

Question Presented

Are contributions to an employee welfare fund made by an employer on behalf of employees pursuant to a collective bargaining agreement entitled to a priority as "wages * * * due to workmen * * * " within the meaning of Section 64a(2) of the Bankruptcy Act?

Introduction and Summary of Argument

There are three material prerequisites for the establishment of a priority claim under Section 64a(2) of the Chandler Act. These are: that the claim must be for wages; that it must not "exceed $600 to each claimant * * * earned within three months before the date of the commencement of the proceedings"; and that it must be "due to workmen". We are here concerned with the satisfaction of but two of these requirements: first, do employer contributions to an employee welfare fund, under a collective agreement, constitute "wages" and, second, are such sums "due to workmen"? It is submitted that both questions should be answered in the affirmative.

It is undisputed that the contributions due from the bankrupt employer do not exceed $600 to each claimant,

that they were earned within the statutory three month period and that the employees whose services created the claim are workmen within the meaning of the Act. Accordingly, these matters are not treated in the argument.

As to the threshold question of whether the claim is for wages, it is shown that Congress for the purposes of Section 64a(2) of the Bankruptcy Act has always considered "wages" to be a generic term. As new and different methods and modes of compensating workmen for their labor have evolved, they have been uniformly held by the courts to constitute wages for the purposes of the Bankruptcy Act, and such interpretation has been affirmed by the Congress. Specific Congressional understanding of employer contributions to welfare funds as wages is shown by its treatment of such contributions as wages in the granting of express exemptions thereto in tax and other legislation. As welfare funds financed by employer contributions have expanded in number and scope with almost explosive force, employees, unions, employers, Congress and its committees and recognized authorities have universally agreed that such contributions are equivalent to wages paid in ready cash. Indeed, until 1955 the courts agreed with this general understanding. It is submitted that in the judicial conflict which has developed since that date, the opinion of the court below construing such contributions as "wages" is the correct interpretation, and should be affirmed.

As to the second question, it is submitted that once it is established that these contributions are "wages", they are as much "due to workmen" as any other form of compensation for the purposes of the Act.

ARGUMENT

POINT I

Employer contributions are "wages" within the meaning of Section 64a (2) of the Bankruptcy Act.

Section A: The Development of Federal Bankruptcy Legislation.

While the Congress of the United States first enacted a bankruptcy statute in the year 1800,[1] it was not until the adoption of the Bankruptcy Act of 1841[2] that a provision granting a priority for unpaid wages, in the event of employer bankruptcy, first appeared in such legislation. Since the passage of the aforementioned statute in 1841, a priority for wages in an ever-increasing amount has been maintained by Congressional action for an unbroken period of 117 years. The priority granted in the Bankruptcy Act of 1841 was for an amount not exceeding $25 to "any person who shall have performed any labor as an operative in the service of any bankrupt" and provided further that such sum shall have been earned within six months next preceding the bankruptcy. In 1867,[3] the amount of this priority was increased to $50. The priority was again increased, to $300, in 1898,[4] and in 1906,[5] the class of employees whose wages were to enjoy this priority was widened. Section 15 of the Bankruptcy Act of 1926,[6] again increased the amount of the priority, said priority now amounting to $600. The passage of the Chandler Act,[7] in 1938, was the last full pronouncement of the Congress on bankruptcy. The Chandler Act advanced the priority for wages in the

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[1] Bankruptcy Act of 1800, c. 19, 2 Stat. 19, repealed by Act of December 19, 1803, c. 6, 2 Stat. 248.

[2] Act of August 19, 1841, c. 9, 5 Stat. 440.

[3] Bankruptcy Act of March 2, 1867, c. 176, 14 Stat. 517.

[4] Act of July 1, 1898, c. 541, 30 Stat. 544.

[5] Act of June 15, 1906, c. 3333, 34 Stat. 267.

[6] Act of May 27, 1926, c. 406, 44 Stat. 662.

[7] Act of June 22, 1938, c. 575, 52 Stat. 840.

scale of preference for distribution of the bankrupt's assets and again broadened the class of employees whose wages were to be accorded the priority. The most recent action by the Congress on this subject was in 1956,[8] when again the only action taken was the broadening of the definition of workmen.

It is important to note that while, during this period of more than a century, the Congress has, from time to time, reenacted, revised or amended the wage priority provision of the Bankruptcy Act, it has never, in any way, seen fit to define the term "wages" for the purpose of this priority.

We, therefore, submit that there is no need now for Congressional action in order to accord a priority to employer contributions to welfare funds, inasmuch as Congress, throughout the entire history of bankruptcy legislation, has given the term "wages" a generic meaning, and the term has been so applied by the courts.

Section B: The Development of Supplemental Forms of Compensation.

It cannot be questioned that employer contributions to welfare funds were not and could not have been contemplated by the Congress when the priority for wages was first created in 1841. Nor for that matter, could such items of compensation as paid vacations and severance pay have been contemplated at that time.[9a] It was not until much later, that these items of compensation, now popularly known as "fringe" benefits became a factor within the system of compensation by which workers are rewarded for their labor.

The great growth in economic fringe benefits to workers has come in the period since 1929,[9] the period

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[8] 11 U. S. C. § 104 (Supp. V 1952).

[9a] Paid vacations and severance pay have consistently been held by the courts to constitute "wages" under the Bankruptcy Act (see p. 9, *infra*).

[9] UNITED STATES DEPARTMENT OF LABOR, A GUIDE TO LABOR-MANAGEMENT RELATIONS IN THE UNITED STATES, March, 1958, § 2:09, p. 1.

which witnessed a parallel growth in trade union membership and expansion of collective bargaining. In 1929, when the cost of all fringe benefits constituted 3% of the total of wages and salaries paid by American employers, only three-tenths of one percent of the total wage bill was for paid vacations.[10] In 1957, on the other hand, when the cost of all fringes had grown to 18% of the wage and salary bill, 3.3% went to provide employees with paid vacations.[11]

During the last decade, we have witnessed a phenomenal growth of employer-supported health, welfare and pension programs. Of this growth, a Senate Committee had this to say (p. 2):

> "Man's quest for greater security spurred the introduction of welfare and pension programs. Wartime expansion, wage stabilization, favored tax treatment, an era of high prosperity and employment, and a desire for greater employer-employee harmony, all fanned by collective bargaining, caused their astonishing growth over the last decade." [12]

By 1956, no less than 62.8% of employees in the wage and salary force were covered by some form of life insurance and death benefits under an employee benefit plan, 62.8% by hospitalization and 58.6% received surgical benefits in the same manner.[13] From a total of 25 master group life insurance policies in effect in 1912, under which 12,000 certificates had been issued covering a total of $13,000,000 of insurance, this form of employee benefit had grown by 1954 to 81,000 master policies in force, under which

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[10] ECONOMIC RESEARCH DEPARTMENT, CHAMBER OF COMMERCE OF THE UNITED STATES, FRINGE BENEFITS 1957, July, 1958, table 21, p. 33.

[11] *Ibid.*

[12] SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, S. Rep. No. 1734, 84th Cong., 2d Sess., FINAL REPORT ON PENSION PLANS INVESTIGATION.

[13] Alfred M. Skolnick and Joseph Zinman, *Growth in Employee Benefit Plans*, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, Social Security Bulletin, March, 1958, p. 4.

28,762,000 certificates had been issued, with a total insurance value of $86,395,000,000.[14] Of the millions of workers covered by collectively bargained health, welfare and pension plans, contribution by the employer only is required in the preponderance of union contracts.[15]

Where, as a result of collective bargaining, health, welfare and pension funds are established for the purpose of providing protection for the covered employees, employer contributions to such funds are regarded by both employer,[16] union and employee alike as compensation for labor performed as much as vacation pay, holiday pay, severance pay, etc.

As pointed out in Note, *Union Retirement and Welfare Plans: Employer Contributions as "Wages" under Section 64a(2) of the Bankruptcy Act*, 66 YALE L. J. 449:

> "They [labor representatives] recognized that these contributions had proved as appealing to many employees as direct wage increases. Furthermore, welfare plans enhanced the union's bargaining position and by giving unions alternative goals, added to their flexibility in negotiating for increased remuneration. *Unions and employees consequently seek and think of employer contributions as the equivalent of wages paid in ready cash.*" [p. 460, Emphasis supplied]

It is clear that to the employer such contributions represent a direct "labor cost" of his doing business just as real as the hourly or piece rate or other fringe benefits which have been held to constitute "wages" under the Bankruptcy Act; to the employee such contributions represent part of his pay which serve to provide him, and in many instances his dependents, with insurance protection,

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[14] See note 12, *supra*.

[15] Rowe, *Health Insurance and Pension Plans in Union Contracts*, 1955 MONTHLY LABOR REV., 993, 995.

[16] See footnote 10, *supra*.

and, as such, these contributions are a form of compensation just as real as the money received in the weekly pay envelope.

This changing concept of wages may be traced by means of a statistical analysis of the growth of such non-classical forms of compensation for labor performed as paid vacations, health, welfare and pension funds and the like. It may be seen as well in the published expressions of the attitudes of the employers who must pay the total wage bill, by the attitudes of the unions who negotiate the "wage package" and of employees who must rely on the protection provided by such contributions in a time of need. In addition, this development may also be found in case law which has arisen from the application of the Bankruptcy Act to economic reality, and its legislative history, as well as by other expressions of Congress.

Section C: Judicial Construction of Supplemental Forms of Compensation as "Wages".

An examination of the pertinent court decisions discloses a steady expansion of the term "wages" as applied to the varying forms of compensation which employees have received, and do receive, for services rendered.

It is well settled "that provisions of the Bankruptcy Act giving priority to claims for wages due employees are to be liberally construed",[17] that the word "wages" must be construed in its broader and more general sense as meaning compensation for services rendered,[18] and that the method and mode of computing the wages is of no relevance in determination of the priority.[19] Thus, "as new methods of computing and paying compensation for services rendered have come into use in commerce and industry over the

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[17] *Manly* v. *Hood*, 37 F. 2d 212, 214 (4th Cir.).
[18] *In re Dexter*, 158 Fed. 788 (1st Cir.).
[19] *In re Gurewitz*, 121 Fed. 982 (2d Cir.).

years, the content of 'wages' in § 64, sub. a(2) has likewise expanded ".[20]

Vacation pay has been held to be "wages".[21] *Division of Labor Law Enforcement* v. *Sampsell*, 172 F.2d 400 (9th Cir.); *In re Public Ledger, Inc.*, 161 F.2d 762 (3d Cir.); *In re Wil-Low Cafeterias, Inc.*, 111 F.2d 429 (2d Cir.); *In re Kinney Aluminum Co.*, 78 F. Supp. 565 (S. D. Cal.).

Severance pay, when brought to the attention of the courts, was uniformly held to fall within the definition of "wages." *Kavanas* v. *Mead*, 171 F. 2d 195 (4th Cir.); *In re Public Ledger, Inc., supra; In re Elliott Wholesale Grocery Co.*, 98 F. Supp. 1017 (S. D. Cal.), aff'd *sub nom, McCloskey* v. *Division of Labor Law Enforcement*, 200 F.2d 402 (9th Cir.).

Likewise, monies due as refunds to miners for their lamps have been held entitled to a wage priority claim. *Kavanas* v. *Mead, supra.* Similarly, back pay awards under the National Labor Relations Act have been held to be "wages" within the meaning of Section 64a(2), provided the other requirements of the Section were met. *National Labor Relations Board* v. *Killoran*, 122 F.2d 609 (8th Cir.), cert. denied, 314 U. S. 696; see also *Nathanson* v. *National Labor Relations Board*, 344 U. S. 25.

So we see, that it is agreed by the courts that "wages" are the compensation for services rendered irrespective of the mode or character which such compensation takes. Courts have given realistic meaning to new concepts and trends by assimilating the "fringe" benefits, which organized labor has gained for the working man at the bargaining table, into the term "wages".

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[20] *In re Otto*, 146 F. Supp. 786, 789 (S. D. Cal.)

[21] Even where there was no collective agreement, the District Court of Rhode Island, as far back as 1903, held vacation pay to be "wages" within the meaning of the Bankruptcy Act. *In re B. H. Gladding Co.*, 120 Fed. 709 (D. R. I.), reversed on other grounds, 124 Fed. 753 (1st Cir.).

At the present time, however, there is conflict among the Courts of Appeals as to whether monies due to a welfare fund, from a bankrupt employer, to provide life insurance, hospitalization and other benefits to the bankrupt's employees are "wages" as contemplated by Congress in the context of the Bankruptcy Act. It is submitted that the conflict between the decision of the Court of Appeals for the Second Circuit in *Local 140 Security Fund* v. *Hack* [22], and the decision of the Court of Appeals in the case at bar, arises solely from the failure of the Second Circuit to meet the threshold issue of whether such contributions constitute compensation for services rendered by workmen, and are, therefore, of necessity wages.[23]

The basis for the holding in the *Hack* case was that the employer contribution was not a debt owing to the individual employee; that the individual employee could not sue for arrearages and that the employee had no proprietary interest in the Funds. These objections are essentially directed to that portion of Section 64a (2) which requires that wages be "due to workmen" without first meeting the question of whether compensation for services, constituting "wages", are involved.[24] The Court in *United States* v.

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[22] 242 F.2d 375 (2d Cir.), cert. denied, 355 U. S. 833, rehearing denied, 27 U. S. L. WEEK 3113 (Oct. 14, 1958).

[23] It is important to note that prior to the issuance of *Matter of Brassel*, 135 F. Supp. 827 (N. D. N. Y.) in 1955 (the rational of *Brassel* was that of the *Hack* decision), referees in Bankruptcy consistently held that employer contributions to Union Welfare Funds were entitled to a wage priority. *Matter of Youth Star Sportwear*, Bankruptcy Cause No. 23003 (E. D. Pa.); *Matter of Westbury Stylists, Inc.*, Bankruptcy Cause No. 23058 (E. D. Pa.); *Matter of Mysie Sportswear*, Bankruptcy Cause No. 23755 (E. D. Pa.); *Matter of 534 Catering Corp.*, Bankruptcy Cause No. 84856 (S. D. N. Y.); *Matter of Charles Schreiber*, Bankruptcy Cause No. 55560 T (S. D. Cal.); *Matter of Barkey & Gay Furniture Co.*, Bankruptcy Cause No. 10008 (W. D. Mich.).

[24] Neither in *Matter of Brassel*, note 23, *supra*, nor in *Matter of Victory Apparel Mfg. Corp.*, 154 F. Supp. 819 (D. N. J.) was the definition of "wages" discussed.

Carter[25] has found in the affirmative on the question of whether the sums are in fact "due to" employees, thereby vitiating the rationale of *Local 140 Security Fund* v. *Hack, supra.*

This issue was, however, squarely met by the Third Circuit in its opinion below wherein the court said:

> "Union Funds providing welfare benefits to employees through employer contributions contracted for in collective bargaining agreements play an essential and evergrowing part in our industrial economy. We are firmly convinced that unions bargain for these contributions as though they were wages, and further that industry considers the contributions as an integral part of the wage package. See Note, 66 Yale L. J., 449, 460 (1957). The contributions are in a true sense the agreed compensation for services rendered and as such must be considered wages. (Footnote) For this reason we are constrained to disagree with the view of the Second Circuit in the Hack decision and to affirm the decision of the district court here."[26]

This threshold issue, the issue of whether welfare and pension contributions are "wages", was met equally well in *In re Otto,* 146 F. Supp. 786, 789 (S. D. Cal.), wherein the court said:

> "*An employer's contributions to a welfare fund for the benefit of employees and others,* payable in performance of an obligation of the employer under a collective bargaining agreement, and measured on the basis of a certain amount per hour worked by employees, *is but another method of computing and paying compensation for services rendered; and accordingly should be held to be 'wages' within the meaning of § 64, sub. a(2) of the Bankruptcy Act.*" [Cf: *McKey* v. *Paradise,* 299 U. S. 119; *In re Public Ledger, Inc.,* 161 F. 2d 762, 767 (3rd Cir.).] [Emphasis supplied]

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[25] 353 U. S. 210.

[26] 254 F.2d 475, 477-78 (3d Cir.).

While it is true that the employee cannot demand the cash value of the employer contributions, it is nevertheless a fact that employer contributions constitute compensation for services rendered by employees. It is the valuable right to the present benefit of protection and the future payment of claims, which the employee purchases by his labor. Certainly, the Bankruptcy Act does not circumscribe the manner in which the employee may spend his compensation. It is not for bankruptcy court "to differentiate between compensations to be used for different purposes". *In re Otto, supra* at 790.

Thus, contributions by an employer under a collective agreement to a welfare fund constitutes nothing less than compensation for services rendered, and as such, are "wages".

Section D: Legislative Intent, and the Meaning of the "Wages" Under 64a(2) of the Act.

A survey of Congressional action demonstrates that Congress intended a generic definition of the term "wages", so as to expand the priority.

As was heretofore demonstrated, despite the fact that the courts have consistently given liberal construction to the term "wages",[27] Congress, in the entire history of bankruptcy legislation, has not seen fit to contract the wage priority.[28] On the contrary, in its last full pronouncement on bankruptcy in 1938,[29] Congress advanced "wages" from fourth to second priority, and at the same time broadened the class to whom the priority was to be accorded. It should be noted, that prior to this, federal taxes enjoyed the place in the scale of priority presently occupied by "wages". Federal taxes are now relegated to the fourth priority, formerly accorded to "wages".

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[27] *Supra*, pp. 8-12.
[28] *Supra*, pp. 4-5.
[29] Note 7, *supra*.

Congress made these changes in the Bankruptcy Act after it had provided in 1935 for a uniform and comprehensive plan for unemployment compensation to workers discharged through no fault of their own, whatever the cause.[30] Not only did Congress fail to delimit or proscribe the definition of the term "wages" in 1938, but instead strengthened the priority, and has since further extended its scope.[31] Under these circumstances, while the Congress may well have intended to strictly limit its protection to those classes of employees enumerated in the Act,[32] it cannot be argued that a corresponding limitation of the wage priority to classical forms of compensation was intended. Thus, it would appear that Congress, by failing to define or delimit the term "wages", desired to provide for the continued expansion of the term "wages", so that it would have realistic meaning.

In seeking to persuade the Court, Petitioner presents the argument that since such contributions are not taxable income, nor treated as wages under certain provisions of the Internal Revenue Code of 1954,[33] they cannot be treated as "wages" for the purpose of this statute. Congress, however, expressly exempted such contributions from the definition of wages under the Social Security Act[34] and Federal Unemployment Tax Act.[35]

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[30] Act of August 14, 1935, c. 531, 49 Stat. 626.

[31] Between 1938 and 1958, the Chandler Act was amended more than twenty-five times. Of these changes, four dealt with Section 64. The most recent amendment to Section 64 was made in 1956. See note 8, *supra*.

[32] 3 COLLIER, BANKRUPTCY § 64.02 at p. 2058 (14th Ed. 1941); *In re Paradise Catering Corp.*, 36 F. Supp. 974 (S. D. N. Y.); *In re Estey*, 6 F. Supp. 570 (S. D. N. Y.).

[33] 26 U. S. C. § 106 (Supp. IV 1952).

[34] 26 U. S. C. § 3121(a) (Supp. IV 1952).

[35] 26 U. S. C. § 3306(b)(2) (Supp. IV 1952).

For the purposes of the Social Security Act wages are defined as:

> "* * * all remuneration for employment including the cash value of all remuneration paid in any medium other than cash * * *."

However,

> "* * * the amount of any payment (including any amount paid by an employer for insurance or annuities or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), or account of—
>
> (A) retirement, or
>
> (B) sickness or accident disability, or
>
> (C) medical or hospitalization expenses in connection with sickness or accident disability, or
>
> (D) death * * *".

is expressly excepted from wages within the meaning of that Act.[36] Similarly, contributions by an employer to welfare plans are expressly exempted from the definition of gross income for income tax purposes under the Internal Revenue Code of 1954,[37] and for the purposes of the Federal Unemployment Tax Act[38] employer contributions into a fund for employee welfare and retirement benefits are exempted from taxation. Thus, we see that when Congress desired to remove employer contributions to welfare funds from the meaning of wages, it has expressly done so.

As Mr. Chief Justice Marshall pointed out in *Brown* v. *Maryland*, 12 Wheat. 419, 438 (U. S.):

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[36] See note 34, *supra*.
[37] See note 33, *supra*.
[38] See note 35, *supra*.

> "* * * a rule of interpretation to which all assent [is] that the exception of a particular thing from general words, proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made * * *."

Clearly then, in enacting the specific exemptions above, Congress indicated its belief that employer contributions to welfare and retirement funds are "wages" unless expressly so exempted.

Surely it cannot be argued that by exempting such contributions from taxation as "wages" under other statutes, Congress intended to exclude such contributions as "wages" under the Bankruptcy Act. To give weight to such an argument is to establish a novel and tortured rule of legislative construction. Whatever weight there is to be given to the fact that the contributions herein are exempt from taxation under other federal statutes, it must be that Congress saw fit as a matter of public policy to encourage the expansion of pension and insurance plans, and not to revise the generic definition of the term "wages" under the Bankruptcy Act.

On the other hand, if one were to look to other statutes for the purpose of defining "wages" in bankruptcy, one would do well to look to the National Labor Relations Act,[39] or for that matter, to a recent report of a sub-Committee of the United States Senate charged with the respon-

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[39] Act of July 5, 1935, c. 372, 49 Stat. 449. In *Inland Steel Co.* v. *National Labor Relations Board*, 170 F.2d 247 (7th Cir.), cert. denied, 336 U. S. 960, the Court held an insurance and retirement plan to be encompassed within the term "wages" upon which an employer is required to bargain under Sections 8(b) and 9(a) of the National Labor Relations Act, 49 Stat. 449 (1935), as amended 29 U. S. C. §§ 151-68 (1952). See also *Cross & Co.* v. *National Labor Relations Board*, 174 F.2d 875 (1st Cir.).

sibility of investigating the operation of welfare funds,[40] or better still to the legislative history of the recently enacted Welfare and Pension Plans Disclosure Act,[41] wherein such statements as the following may be found:

> "Regardless of the form they take, the employers' share of the cost of these plans or the benefits the employers provide are a form of compensation."[42]

In sum, because the courts have consistently given a liberal interpretation to the term "wages", and because Congress has steadily expanded the priority and its purpose, wages in bankruptcy must be defined generically, as compensation for services rendered. Accordingly, employer contributions to health, welfare and pension plans should be considered as "wages".

POINT II

Employer contributions to a fund established to provide welfare benefits to employees are wages "due to workmen" within the meaning of the Bankruptcy Act.

In *United States* v. *Carter*, 353 U. S. 210, it was held that for purposes of the Miller Act,[43] employer contributions to a welfare fund under a collective agreement are "due to" the employees upon whose behalf they are made.

This Court, in that case, concluded that employer contributions, owing under a collective agreement, were no less "due to" workmen because the employee, through his col-

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[40] See note 12, *supra*.

[41] P. L. No. 85-836, 72 Stat. 997; see 1958 U. S. CODE CONG. AND ADMIN. NEWS 4813-86.

[42] *Ibid.*, p. 4815, S. REP. No. 1440, 85th Cong., 2d Sess.

[43] 40 U. S. C. § 270b(a) (1952).

lective bargaining agent, has seen fit to have a portion of his compensation paid directly to a trust fund, established for his exclusive benefit to provide him with insurance protection. The fact that such protection was provided through a collective agreement, rather than an individual wage assignment, was not considered relevant.[44]

In that case, this Court had before it an issue similar to the one in the instant case, and the relevant words were essentially identical to those in 64a(2) of the Bankruptcy Act.

Section 2(a) of the Miller Act provides that:

> "Every person who has furnished labor or material in the prosecution of the work provided for in such contract * * * *and who has not been paid in full therefor* * * * shall have the right to sue on such payment bond * * * *for the sum or sums justly due him.*" (Emphasis supplied.)

In the *Carter* case, a collective agreement between a union representing the defendant's laborers and several employer associations, one of whom represented the defendant, provided for employer contributions to the trustees of a health and welfare fund for the covered employees. The contractor failed to make these contributions, and the trustees of the fund sued the surety on the payment bond.

In reply to the surety's argument that the employees had been paid in full, this Court pointed out that the contributions were a part of the consideration for services rendered, and until the contributions were made the employees were not "paid in full", as required by that statute.

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[44] It is settled that a worker may assign wages, and the assignee may exercise the priority for wages in the event of bankruptcy of the assignor's employer. *Shropshire, Woodliff & Co.* v. *Bush*, 204 U. S. 186. See also, *In re Ross*, 117 F. Supp. 346 (N. D. Cal.).

When the surety argued that the trustees were neither the persons who had furnished labor or material, nor are they seeking sums "justly due" to persons who furnished the labor or materials, the Court said:

> "If the assignee of an employee can sue on the bond, the trustees of the employees' fund should be able to do so. Whether the trustees of the fund are, in a technical sense, assignees of the employees' rights to the contributions need not be decided. Suffice it to say that the trustees' relationship to the employees, as established by the master labor agreements and the trust agreement, is closely analogous to that of an assignment. The master labor agreements not only created Carter's obligation to make the specified contributions, but simultaneously created the right of the trustees to collect those contributions on behalf of the employees. The trust agreement gave the trustees the exclusive right to enforce payment. The trustees stand in the shoes of the employees and are entitled to enforce their rights.
>
> "Moreover, the trustees of the fund have an even better right to sue on the bond than does the usual assignee since they are not seeking to recover on their own account. The trustees are claiming recovery for the sole benefit of the beneficiaries of the fund, and those beneficiaries are the very ones who have performed the labor. The contributions are the means by which the fund is maintained for the benefit of the employees and of other construction workers. For purposes of the Miller Act, these contributions are in substance as much 'justly due' to the employees who have earned them as are the wages payable directly to them in cash." (pp. 219-20).

Although this Court in the *Carter* case had before it a trust instrument expressly providing that the contributions "shall not constitute or be deemed wages", it considered these contributions "a part of the compensation for the work to be done by Carter's employees," and, therefore,

in the nature of "wages payable directly to [employees] in cash". The sole test which the courts in bankruptcy have applied in determining whether supplemental forms of compensation were to be construed as "wages" has been whether in fact they constituted compensation for services rendered. It was on this basis that the Court of Appeals below, and the court in *In re Otto, supra,* found contributions such as herein involved to be "wages".

As we have shown (see *supra,* pp. 12-16), Congress has seen fit to expand the purpose of the wage priority not only by express action, but also by its implied ratification, of the generic construction of the term by the courts. In our view, the recognition by this Court in the *Carter* case that contributions, such as are herein involved, are compensation for services rendered by employees, that such contributions are earned by the employees, that such contributions are due to the employees, and that the employees have a definite proprietary interest in both the contributions and funds themselves, applies equally to the instant case so as to support a priority under Section 64a(2) of the Bankruptcy Act.

CONCLUSION

For the reasons stated in this brief it is respectfully submitted that the decision of the Court of Appeals below should be affirmed.

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